MAY 4 1942

Supreme Court of the United States

OCTOBER TERM, 1941.

NOS. 1209-1210

GLADYS M. WESTPHAL, WIDOW OF F. GILBERT WESTPHAL, SHIRLEY JUNE WESTPHAL, JANICE BETH WESTPHAL, AND ELLEN MAE WESTPHAL, MINORS, CHILDREN OF GLADYS M. WESTPHAL AND F. GILBERT WESTPHAL, BY GLADYS M. WESTPHAL, THEIR GUARDIAN AD LITEM,

Petitioners,

vs.

KANSAS CITY LIFE INSURANCE COMPANY, KANSAS CITY, MISSOURI, A CORPORATION.

GLADYS M. WESTPHAL, WIDOW OF F. GILBERT WESTPHAL,

Petitioner,

vs.

KANSAS CITY LIFE INSURANCE COMPANY, KANSAS CITY, MISSOURI, A CORPORATION.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

ARNOLD C. OTTO,
Counsel for Petitioners.

INDEX.

Subject Index.

	Page
Petition for Writs of Certiorari	1
Summary statement of matter involved	2
Jurisdiction of Supreme Court to review	7
The questions presented	8
Reasons relied on for allowance of writs	9
Brief in support of petition for writs of certiorari	13
Opinions of Courts below	13
Grounds of jurisdiction	14
Statement of the case	14
Specification of errors	14
Argument	15
Summary of argument	15
A. The issue of fact presented by the evidence was a question for the jury, and such fact tried by the jury, on respondent's motion under new Rule 50 (b) to set aside the verdict, could not under the Seventh Amendment be otherwise re-examined than according to the rules of the common law	15
B. The Court of Appeals under the common law and the Seventh Amendment could not disregard the ordinary formulæ concerning the province of judge and jury and usurp the function of the jury and decide under Rule 50 (b) what inference was to be made from the evidence, that was the province of the jury as the fact finding tribunal	38
C. The District Court could not properly allow the deduction in the judgment made for alleged indebtedness of the insured from the insurance recovered by the widow	43
Conclusion	45
Appendix	47
Rule 50 (b), F. R. C. P.	47
Wis. Stat. 1939, Sec. 246.08	47
Wis. Stat. 1939, Sec. 272.18 (19)	48

Page

Table of Cases Cited.

Aetna Life Ins. Co. v. *Ward*, 140 U. S. 76, 91 6
Allen v. *Central Wis. Trust Co.*, 143 Wis. 381, 384, 385 44
Anson v. *N. Y. Life Ins. Co.*, 252 Ill. 369, 96 N. E. 846-847 44

Berry v. U. S., 312 U. S. 450, 452-453 ..... 7, 9, 10, 39
Bohner v. *Great Atlantic & Pacific Tea Co.*, 211 Wis. 501, 503 37
Borg v. *Downing*, 221 Wis. 463, 465 43
Bradley v. *Modern Woodmen of America*, 146 Mo. App. 428, 124 S. W. 69, 75 31

Cannon v. *Lincoln Natl. Life Ins. Co.*, 208 Wis. 452, 454, 455 44
Christiansen v. *Aetna Cas. and Surety Co.*, 204 Wis. 323, 327 41
Consolidated Edison Co. v. *Natl. L. R. Board*, 305 U. S. 197, 229 36
Conway v. *O'Brien*, 312 U. S. 492 ..... 9, 38

Dauplaise v. *Yellow Taxicab Co.*, 204 Wis. 419, 421 43
Delaney v. *Metropolitan Life Ins. Co.*, 216 Wis. 265, 268, 269, 270, 271 ..... 27, 31, 32, 33, 40
Dobelin v. *Maccabees*, 171 Wis. 54, 58 31
Duncan v. *Montgomery Ward & Co.*, 108 F. (2d) 848, 851 (CCA 8) 34

Engstrum v. *Sentinel Co.*, 221 Wis. 577, 578 35
Erie R. Co. v. *Tompkins*, 304 U. S. 64 ..... 12, 26, 32
Ewing v. *Metropolitan Life Ins. Co.*, 191 Wis. 299, 300-301 ..... 26, 32

Fid. Mut. Life Assn. v. *Mettler*, 185 U. S. 308, 319 ..... 32, 33
First Wis. Natl. Bk. v. *Roehling*, 224 Wis. 316, 324 44
First Wis. Natl. Bk. v. Strelitz, 209 Wis. 335, 338, 339 44
Flynn v. *Crume*, 101 F. (2d) 661, 662 (CCA 7) 35

Geffert v. Kayser, 179 Wis. 571, 573 35
Griffin v. *Northwestern Mut. Life Ins. Co.*, 250 Mich. 185, 194-195 27
Gunning v. *Cooley*, 281 U. S. 90, 92, 94 ..... 34, 37, 38

Halliday v. *U. S.*, 86 L. Ed. 393 ..... 10, 38
Hansen v. *Central Verein*, 198 Wis. 140, 144 32
Hickman v. *Jones*, 9 Wall., 76, U. S. 197, 201-202 40

Jacob v. *City of New York*, 86 L. Ed. 750 ..... 7, 9, 11
Jasperson v. *Ind. Comm.*, 231 Wis. 142, 146 36

Page

Kansas City Life Ins. Co. v. *Marshall,* 84 Colo. 71, 268 Pac. 529, 532, 533 29

La Guerra v. *Brasileiro,* 124 F. (2d) 553, 554 (CCA 2) 42

Maahs v. *Schultz,* 207 Wis. 624, 629-630 42

Mutual Life Ins. Co. v. *Louisville Trust Co.,* 207 Ky. 654, 269 S. W. 1014, 1016 29

Phoenix v. *Doster,* 106 U. S. 30, 32 40

Richmond & Danville Railroad v. *Powers,* 149 U. S. 43, 45 37

Schaefer v. *U. S.,* 251 U. S. 466, 476 40

Schwartz v. *Zellmer,* 209 Wis. 583, 587 34

Southern Fruit Distributors, Inc. v. *Fulmer,* 107 F. (2d) 456, 458 (CCA 4) 39

Storck v. *Northwestern Natl. Cas. Co.,* 115 F. (2d) 889, 890 (CCA 7) 35

Story Parchment Co. v. *Peterson Parchment Co.,* 282 U. S. 555, 564, 566 ..... 7, 36

Texas & Pac. Ry. Co. v. *Harvey,* 228 U. S. 319, 324, 325 39

Trautmann v. *Schefft,* 201 Wis. 113, 115-116 ..... 35, 37, 43

Union Central Life Ins. Co. v. *Woods* (Ind.), 37 N. E. 180, 183 44

Viereg v. *Southwestern Wis. Gas Co.,* 212 Wis. 394, 395 8

Webster v. *Krembs,* 230 Wis. 252, 256 42

White v. *Brotherhood of Locomotive Firemen,* 165 Wis. 418, 422, 423 ..... 26, 27

Whiteley v. *Equitable Life Ass. Soc.,* 72 Wis. 170, 174, 176-178, 179 ..... 26, 27, 33, 34

Wis. Trust Co. v. *Wis. Marine and Fire Ins. Co. Bk.,* 105 Wis. 464, 468 27

OTHER CITATIONS.

17 C. J. 1170, Sec. 9 c 31

Act of February 13, 1925, C. 229, 43 Stats. 938 7

Act of June 19, 1934, C. 651, 48 Stats. 1064 35

Wis. Stats., 1929 and 1939, Sec. 246.08 44

Wis. Stats., 1939, Sec. 272.18 (19) 47, 48

Seventh Amendment 6, 8, 10, 11

Rule 50 (a), F. R. C. P. 3

Rule 50 (b), F. R. C. P. 3, 5, 6, 8, 9, 10, 11, 14, 15, 36, 38, 39, 42, 48

Supreme Court of the United States

OCTOBER TERM, 1941.

NOS.

GLADYS M. WESTPHAL, Widow of F. Gilbert Westphal, SHIRLEY JUNE WESTPHAL, JANICE BETH WESTPHAL, and ELLEN MAE WESTPHAL, Minors, Children of Gladys M. Westphal and F. Gilbert Westphal, By GLADYS M. WESTPHAL, Their Guardian ad Litem,

Petitioners,

vs.

KANSAS CITY LIFE INSURANCE COMPANY, Kansas City, Missouri, a Corporation.

GLADYS M. WESTPHAL, Widow of F. Gilbert Westphal,

Petitioner,

vs.

KANSAS CITY LIFE INSURANCE COMPANY, Kansas City, Missouri, a Corporation.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

May It Please the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of Gladys M. Westphal, Widow of F. Gilbert Westphal, Shirley June Westphal, Janice Beth

Westphal, and Ellen Mae Westphal, Minors, Children of Gladys M. Westphal and F. Gilbert Westphal, by Gladys M. Westphal, their Guardian ad Litem, plaintiffs and appellees below, and of Gladys M. Westphal, Widow of F. Gilbert Westphal, plaintiff and appellant below, respectfully shows to this Honorable Court:

Petitioners pray that writs of certiorari issue to review the judgments of the United States Circuit Court of Appeals for the Seventh Circuit, entered in the above entitled causes on February 5, 1942, (R. 287, 288), the first judgment reversing the judgment of the District Court of the United States for the Eastern District of Wisconsin entered on August 6, 1941, (R. 250-252), the second judgment dismissing the appeal of Gladys M. Westphal.

Summary Statement of Matter Involved.

Petitioners, a widow and three minor children of F. Gilbert Westphal, brought this action and recovered a judgment as beneficiaries under three insurance policies issued on his life by the Kansas City Life Insurance Company, Kansas City, Missouri, respondent herein, two policies being for $5,000 each, and one for payments of $25.00 a month over the period remaining after the death of Mr. Westphal within twenty years from the date of the policy and a payment of $2500 at the end of the twenty years (R. 3-10).

Mr. Westphal had been missing and unheard of since November 5, 1931, (R. 166), in Milwaukee, Wisconsin, where he had been residing with his wife and three children in the suburb of the Village of Shorewood for the past two years, and had been employed as cashier and insurance salesman in the branch office of respondent for thirteen months. He was then 32 years of age and had been married ten years (R. 26). He also had living at

that time his father and mother, four brothers, and a married sister (R. 26, 115-119).

The action was commenced March 30, 1940, (R. 2-3), in the Circuit Court of Calumet County, in the State of Wisconsin, in which county petitioners resided in the City of Chilton, and on application of respondent, a foreign corporation, exercising its privilege of selecting a different tribunal, was removed for trial on account of diversity of citizenship to the Federal Court (R. 2). Petitioners served and filed a timely demand for trial by jury on all the issues (R. 17).

Only one issue was made in the pleadings and asserted on the trial, and tried, and that was whether Mr. Westphal had died within certain dates, (R. 3-15), which issue was submitted to the jury on a special verdict of three questions, each question fixing a date, being in the order of the questions, May 28, 1932, April 30, 1932, and November 26, 1931. No objection was made to the instructions to the jury. The jury found that he died before each of said dates (R. 226). The dates so selected by the trial court were the days to which the payment of premiums had made the policies effective.

Respondent at the close of the testimony had moved orally for a directed verdict, the ruling on which was reserved by the trial court under Rule 50 (b), Federal Rules of Civil Procedure. Petitioners entered an objection to the motion (R. 168). After verdict respondent within ten days filed written motions to change the answers of the verdict and for judgment (R. 228-229). Petitioners having objected that the oral and written motions failed to specify grounds as required by Rule 50 (a), Federal Rules of Civil Procedure, the trial court by order amended the motions to disclose the grounds therefor as insufficiency of evidence of petitioners to go

to the jury (R. 228). This then was the issue made on the motions. The trial court filed its written opinion denying respondent's motion, holding, (R. 229-239, reported in 37 F. Supp. 300):

> "that under the Wisconsin decisions the question as to the time of death was for the jury, and that, viewing the evidence in the light most favorable to the petitioners, there was sufficient evidence to sustain the answers to the verdict."

Later other matters mentioned in the opinion of the Court were brought on by motion and disposed of. They are not material to this petition (R. 15-16, 227, 240-244).

However, after order for judgment on the verdict, and before entry of judgment, on claim first brought on by motion of respondent on behalf of the Hartford Accident and Indemnity Company, who had bonded Mr. Westphal as cashier (R. 244-245), the trial court made findings of fact and conclusions of law (R. 245-247), the same as if the issues therein had been duly pleaded, asserted, and tried on the merits between all interested parties, providing for deduction in the judgment from the insurance recovered by petitioner Gladys M. Westphal, widow of the insured, of the sum of $1500 plus interest, or total of $2343.75, for premiums alleged by respondent to have been collected by Mr. Westphal as cashier and not to have been remitted up to November 5, 1931, and alleged by respondent to be cause for disappearance, under clauses in the policies relating to deduction from the insurance of certain indebtedness to the company by the insured, to which findings the said petitioner filed objections and a motion to vacate and set aside the same, (R. 247-249), which was denied (R. 249-250). Intervention had theretofore been denied to the Hartford Company (R. 17-24). These issues had not been asserted and tried. (See Stipulation of parties, R. 260-261).

Respondent appealed from the final judgment (R. 250-252) of the District Court to the United States Circuit Court of Appeals for the Seventh Circuit (R. 252-253). Petitioner Gladys M. Westphal then filed a cross-appeal from that part of the judgment allowing the aforesaid deduction (R. 257-260). The appeals were heard together. Of the three questions raised by respondent, the Court of Appeals considered only the one relating to the action of the District Court under Rule 50 (b) denying respondent's motion for a directed verdict (R. 282). The Court of Appeals, Judge Evans dissenting, ordered the judgment of the District Court reversed (R. 287-288), and in view of the result reached, the cross-appeal of petitioner Gladys M. Westphal dismissed (R. 288).

On the one issue considered, the majority of the United States Circuit Court of Appeals for the Seventh Circuit in its decision, now sought to be reviewed (R. 279-287, reported in 126 F. (2d) 76), did not mention the settled rule that on such a motion the Court must necessarily accept the view of the evidence and the inferences to be drawn therefrom most favorable to petitioners. The Court of Appeals violated this rule. The Court of Appeals was satisfied that, — "unmistakably, there are two inferences made from the evidence." This states a conclusion by the majority judges agreeing with the dissenting opinion, and the trial judge, that there was evidence, not a presumption of fact, upon which the jury could justly and properly base its verdict and finding. The Court of Appeals was not satisfied with the finding of the jury, and held that "the ordinary formulae concerning the province of Judge and jury are of little value in a case of this nature," and then proceeded to invade and usurp the province of the jury and to themselves make their finding from the evidence, reversing the judgment of the District Court and thereby depriving petitioners of trial by jury

on the question of fact to be determined from the evidence in this case and violating the Seventh Amendment to the Constitution of the United States, which provides:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Where fairminded men can honestly draw different conclusions, the question is not one of law but of fact to be settled by the jury. The verdict of the jury need not satisfy the Appellate Court, nor the trial court. This is a settled rule of this Court and also the Supreme Court of Wisconsin, and has not been modified by new Rule 50 (b).

> "It may be that if we were to usurp the functions of the jury and determine the weight to be given to the evidence, we might arrive at a different conclusion. But that is not our province on a writ of error." *Aetna Life Ins. Co.* v. *Ward*, 140 U. S. 76, 91.
>
> "The law does not require that the evidence shall satisfy the trial judge. If reasonable minds may differ as to the conclusions of ultimate fact to be drawn from the evidence, the verdict of the jury must be upheld whether the evidence satisfies the trial judge as to the correctness of the jury's conclusions or not."
>
> "But he is not a trier of the facts, and may not usurp the functions of the jury." *Viereg* v. *Southwestern Wis. Gas Co.*, 212 Wis. 394, 395.

It certainly cannot be said that the inference of fact from the evidence accepted by the Court of Appeals was the most favorable to petitioners which could be founded upon the testimony, and that the Court of Appeals in re-examining the fact tried by the jury applied the rules

of the common law governing jury trials. It has been the long settled law in jury trials that the rule mentioned above must be given its fullest application in considering the discard of a jury verdict. Though there was evidence here from which the jury might have reached a different conclusion, that is not under the common law cause for discarding the verdict. It is only where the evidence upon the issue is all on one side, or so overwhelmingly on one side as to leave no room to doubt what the fact is, that the verdict should be set aside. The finding of the jury must be allowed to stand unless all reasonable men exercising an unprejudiced judgment would draw an opposite conclusion. Where the case is close and a jury might find either way, it is no reason for a court to usurp the function of the jury. These are applicable rules stated by this Court in, *Jacob* v. *City of New York*, decided March 30, 1942, 86 L. Ed. 750; *Gunning* v. *Cooley*, 281 U. S. 90, 92, 94; *Berry* v. *United States*, 312 U. S. 450, 453, 456; and *Story Parchment Co.* v. *Peterson Parchment Co.*, 282 U. S. 555, 556. Circuit Judge Evans dissenting, (R. 284-287, 126 F. (2d) 79-80), adheres to the correct rule, and holds that the District Court properly submitted the case to the jury.

The majority of the Court of Appeals in its opinion does not state the evidence as favorable for petitioners as would be logical for consideration under the correct rule and in a way as can be reasonably assumed the jury accepted it as adequate for their verdict. The facts are further discussed in the brief of petitioners.

Basis of Jurisdiction.

The jurisdiction of this Court to review this case the same as if brought here by unrestricted appeal is based upon Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, C. 229, 43 Stats. 938, 28 U. S. C. A., Sec. 347.

The judgments of the Circuit Court of Appeals to be reviewed were entered February 5, 1942, (R. 287-288). Petition for rehearing timely filed by petitioners (R. 288) was denied on February 26, 1942 (R. 288).

Questions Presented.

The two main questions here presented go directly to the province of the jury and the power of the Court under new *Rule 50 (b), Federal Rules of Civil Procedure,* (see Appendix), to determine questions of fact and to the protection of the right of trial by jury deemed worthy of constiutional provision and safeguard and made sacred to every citizen by the Seventh Amendment to the Constitution of the United States:

1. Whether the United States Circuit Court of Appeals for the Seventh Circuit violated the Seventh Amendment to the Constitution of the United States and the common law governing jury trials in reviewing the action of the District Court under new Rule 50 (b), on motion of respondent to set aside the verdict on the ground of insufficiency of evidence, in failing to take the view of the evidence and the inferences to be drawn therefrom most favorable to petitioners, evidence which the jury might have accepted as adequate to support the conclusion reached in their verdict, and thereby deprived petitioners of trial of the issue of fact by jury.

2. Whether the Court of Appeals in reviewing the action of the District Court under new Rule 50 (b) could disregard the ordinary formulae concerning the province of judge and jury and usurp the function of the jury and decide what inference of fact was to be made from the evidence and violate the rules of the common law governing jury trials and deprive petitioners of their right of trial by jury guaranteed by the Seventh Amendment to

the Constitution of the United States, or whether that function rested exclusively with the jury as their province as the fact finding tribunal.

Subsidiary, and after recovery of judgment by petitioners, is this question:

3. Whether the Circuit Court of Appeals properly dismissed the appeal of petitioner Gladys M. Westphal, thereby approving the allowance made by the District Court of the deduction in the judgment for alleged indebtedness of the insured from the insurance recovered by said petitioner.

Reasons Relied on for the Allowance of the Writs.

1. The Circuit Court of Appeals in reviewing the action of the District Court under new Rule 50 (b) and in reversing the judgment of the District Court has decided the questions as to the sufficiency of the evidence of petitioners to go to the jury, and as to the application of the ordinary formulae concerning the province of judge and jury, and the power of the jury or the Court of Appeals to draw the inference of fact to be made from the evidence, in a way probably in conflict, not only with the decisions of its own Circuit, but also of other circuits, and also the State of Wisconsin, and particularly in conflict with the applicable decisions of this Court, as is pointed out in the Brief on this petition, in the cases of, *Gunning* v. *Cooley*, 281 U. S. 90, 92, 94; *Berry* v. *U. S.*, 312 U. S. 450, 453, 456; *Jacob* v. *City of New York*, decided March 30, 1942, 86 L. Ed. 750; and other cases.

2. There is uncertainty as to the extent of power of the Circuit Courts of Appeals in reviewing the action and discretion of the District Courts under new Rule 50 (b) in re-examining facts tried by a jury as has been recently pointed out by this Court in *Conway* v. *O'Brien*,

312 U. S. 492; *Berry* v. *U. S.*, 312 U. S. 450; and *Halliday* v. *U. S.*, decided January 19, 1942, 86 L. Ed. 393, which question involves the construction of this rule in relation to the Seventh Amendment to the Constitution of the United States, and which question has not been, but should be, settled by this Court.

3. There was substantial evidence to make a jury question whether Mr. Westphal died at the time found by the jury, and for this reason the verdict of the jury should have been upheld and the decision of the trial judge, who held that the question of the time of death was for the jury, and who after having had the same opportunity as the jury to see the many witnesses and hear the evidence on the trial which consumed eight days ruled there was sufficient evidence to sustain the verdict, should have been affirmed by the Circuit Court of Appeals.

4. The conclusion of the majority of the Court of Appeals that "unmistakably, there are two inferences made from the evidence," is an agreement on its part with the trial judge and also Circuit Judge Evans dissenting, that there was sufficient evidence which the jury might have accepted as adequate to support their verdict. After reaching that conclusion the majority of the Court of Appeals has said they have no right to decide which is the right inference. That decision was exclusively for the jury to make as the fact finding tribunal and is binding on the Appellate Court on review. It was the duty of the majority to accept the inference of fact reached by the jury, and to affirm the judgment of the District Court denying respondent's motion under Rule 50 (b) for a directed verdict based on the ground of insufficiency of evidence.

5. The Circuit Court of Appeals in reviewing on appeal the action of the District Court under new Rule 50 (b) on respondent's motion for a directed verdict should

have followed the ordinary formulae concerning the province of judge and jury and not have departed therefrom without precedent or authority in the law and contrary to the Seventh Amendment, and after being satisfied that there are two inferences made from the evidence and that fairminded men can honestly draw different conclusions from the evidence, should not have usurped the function of the jury and decided which inference of fact was to be made from the evidence and have violated the general common law governing jury trials and the Seventh Amendment to the Constitution of the United States and deprived petitioners of their right of trial by jury preserved by this provision of the Federal Constitution.

6. A decision by this Court is necessary in this case to preserve the right of trial by jury as a birthright and heritage guaranteed to every citizen and to keep sacred the Seventh Amendment to the Constitution of the United States, and to prevent abuses of power and conflicting decisions by the courts as to their powers under new Rule 50 (b) of the Federal Rules of Civil Procedure.

> "The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts." *Jacob* v. *City of New York*, decided March 30, 1942, 86 L. Ed. 750, 751.

7. Under the Wisconsin decisions the question of the time of death during the seven-year period was for the jury. Wisconsin, as stated by Circuit Judge Evans, is in accord with the Supreme Court decisions of many states (R. 285). Respondent removed this case for trial to the Federal Court and petitioners under the supervisory powers of this Court are entitled to have applied under

Erie R. Co. v. *Tompkins,* 304 U. S. 64, by the United States Circuit Court of Appeals for the Seventh Circuit the Wisconsin law.

8. In reversing the judgment of the District Court in this case, the Circuit Court of Appeals has made a wide departure from the conduct of jury trials and the province of the jury considered worthy of constitutional provision and safeguard, and has so far departed from the accepted and usual course of judicial proceedings on jury trials as to call for an exercise of this Court's power of supervision.

WHEREFORE, petitioners pray for the reasons here stated and in the supporting brief, that this petition for writs of certiorari be allowed so that the judgments of the Circuit Court of Appeals for the Seventh Circuit may be reviewed and reversed by this Honorable Court.

Dated April 30, 1942.

GLADYS M. WESTPHAL, Widow of F. Gilbert Westphal, SHIRLEY JUNE WESTPHAL, JANICE BETH WESTPHAL, and ELLEN MAE WESTPHAL, Minors, Children of Gladys M. Westphal and F. Gilbert Westphal, by GLADYS M. WESTPHAL, their Guardian ad Litem,

By ARNOLD C. OTTO,
740 North Plankinton Avenue,
Milwaukee, Wisconsin,
Counsel for Petitioners.

Supreme Court of the United States

OCTOBER TERM, 1941.

NOS.

GLADYS M. WESTPHAL, Widow of F. Gilbert Westphal, SHIRLEY JUNE WESTPHAL, JANICE BETH WESTPHAL, and ELLEN MAE WESTPHAL, Minors, Children of Gladys M. Westphal and F. Gilbert Westphal, by GLADYS M. WESTPHAL, Their Guardian ad Litem,

Petitioners,

vs.

KANSAS CITY LIFE INSURANCE COMPANY, Kansas City, Missouri, a Corporation.

GLADYS M. WESTPHAL, Widow of F. Gilbert Westphal,

Petitioner,

vs.

KANSAS CITY LIFE INSURANCE COMPANY, Kansas City, Missouri, a Corporation.

BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI.

Opinions of the Courts Below.

The opinion of the District Court, filed February 27, 1941, appears at R. 229-239, and is reported in 37 F. Supp. 300-306. The opinion of the Circuit Court of Appeals, Judge Evans dissenting, filed February 5, 1942, appears at R. 279-287, and is reported in 126 F. (2d) 76-80.

Grounds of Jurisdiction.

The grounds of jurisdiction appear in the petition, which statement is here adopted as part of this brief.

Statement of the Case.

The summary statement in the petition of the matters involved outlines the action taken by the District Court and by the Circuit Court of Appeals. A discussion of facts appears in the argument later herein, *infra* 15 to 26.

Specification of Errors to Be Urged.

The United States Circuit Court of Appeals for the Seventh Circuit erred:

1. In reversing the Judgment of the District Court of the United States for the Eastern District of Wisconsin.

2. In failing to follow the rules of the common law as required by the Seventh Amendment in reviewing the action of the District Court under new Rule 50 (b), Federal Rules of Civil Procedure.

3. In not taking the view of the evidence and the inferences to be drawn therefrom most favorable to petitioners, and not holding there was substantial evidence which the jury might have accepted as adequate to support the conclusion reached in their verdict.

4. In refusing to apply the ordinary formulæ concerning the province of judge and jury and usurping the function of the jury and deciding which of two inferences made from the evidence in this case shall be accepted.

5. In dismissing the appeal of petitioner Gladys M. Westphal and failing to disallow the deduction made in the Judgment for alleged indebtedness of the insured from the amount of insurance recovered by the widow.

ARGUMENT.

Summary of Argument.

A. The Issue of Fact Presented By the Evidence Was a Question for the Jury, and Such Fact Tried By the Jury, on Respondent's Motion Under New Rule 50 (b) to Set Aside the Verdict, Could not Under the Seventh Amendment Be Otherwise Re-examined Than According to the Rules of the Common Law.

B. The Court of Appeals Under the Common Law and the Seventh Amendment Could not Disregard the Ordinary Formulae Concerning the Province of Judge and Jury and Usurp the Function of the Jury and Decide Under Rule 50 (b) What Inference Was to Be Made From the Evidence. That Was the Province of the Jury As the Fact Finding Tribunal.

C. The District Court Could Not Properly Allow the Deduction in the Judgment Made for Alleged Indebtedness of the Insured From the Insurance Recovered By the Widow.

Point "A".

A. The issue of fact presented by the evidence was a question for the jury, and such fact tried by the jury, on respondent's motion under new Rule 50 (b) to set aside the verdict, could not under the Seventh Amendment be otherwise re-examined than according to the rules of the common law.

The following evidence of facts and circumstances and of Mr. Westphal's character, habits, activities, home and family life, make absence without death at the time found

by the jury improbable in his life, and constitutes such substantial evidence as the jury might accept as adequate to support the conclusion reached in their verdict.

The last day Mr. Westphal was seen was November 5, 1931. That day is undisputed (R. 166). He got up at his usual time and prepared, as he ordinarily did, to go to work. He was in his usual manner in leaving home and kissing his wife goodbye, as he usually did. She noticed nothing out of the ordinary in his actions or attitude toward her or the children, or in any other way (R. 37, 38).

He took nothing from his home, not one thing or article of personal use or affection of any kind (R. 51).

He had been very ill during the night before, after he had returned home from downtown that evening with his wife and oldest daughter and after sleeping for a while. He got up, so did his wife to assist him. She wanted to call the doctor. She was afraid of appendicitis. He took soda, they went to sleep again (R. 36, 38). Mr. Lippert, City Manager at respondent's office, knew he was ill on November 5. At 2:30 P. M. on that day he telephoned Mrs. Westphal, stating Mr. Westphal had left a note he was ill. Mr. Lippert wanted to know how he was (R. 42-44).

The weekend before, October 31, Hallowe'en, he and his wife were with friends at a house party at Fond du Lac. They had driven to Chilton where they left the children with her folks, and then on Sunday returned to Chilton, and from there drove back to Milwaukee. There was nothing out of the ordinary about him during those days. He was not dejected or worried (R. 34, 35, 36, 88-89). On November 1 he was given a raise in salary from $150 to $175 a month, which was approved by Mr. Madden, branch manager in Milwaukee, and the home office (R. 136, 141, 98).

Mr. Westphal was the father of four children, one son who died in infancy, and three daughters, as lovely as one could wish for, petitioners herein, aged on November 5, 1931, eight, four, and three years, of whom and his wife he was extremely fond, and to whom he was most devoted and kind. They had a fine home life. He never spoke a cross word, there was no meanness on his part. He spent his spare time at home, he liked to be at home with his wife and children. They would visit their relatives as much as they could. He idolized his children, would talk to them, take them for a ride, and read them bedtime and Bible stories. They were a happy couple and family (R. 28, 30, 84-86, 88-94, 107-115).

Mr. Westphal came of a fine family. On November 5, 1931, and at the time of the trial, his parents were living in Reading, Pennsylvania. His father was a minister and for a number of years had been pastor of Washington Park Presbyterian Church in Milwaukee (R. 114). He had four brothers, one a minister and Director of Adult Education, Presbyterian Board of Christian Education, residing at Philadelphia; one a minister of North Presbyterian Church in Pittsburgh; one a physician and surgeon in the United States Public Health Service at Attica, New York; one an aeronautical engineer for Waco Aircraft Company at Troy, Ohio; and a married sister living in Pittsburgh. He kept contacts and was on friendly terms with all, visited and corresponded with them. They have not seen him or had any tidings from him since November 5, 1931, nor do they know of anyone who has (R. 26, 115-119).

Mr. Westphal had been active in Boy Scout work. He and his wife regularly attended church and Sunday School. He sang in the choir. He earned his money to go to college, he made an excellent record; he sometimes preached where the minister was away. He sang and gave

time for community affairs. Everyone who had ever known him knew he had devoted his time and activities to those things which are good and worthy in life, that he was a good upright citizen, a man of good character and habits, fond of his home and family, and highly regarded by all. Testimony thereof was given by his wife (R. 28, 30); his oldest daughter Shirley (R. 110-111); Professor Batha now Professor of Physics at Carroll College who was then in college and lived in the same barracks of the Student Army Training Corps (R. 94-95); Mr. Hertz now Special Agent for the Bankers Life Insurance Company who was also then in college (R. 96-97); Miss Conrad of Waukesha at whose home he roomed while at college (R. 95-96); Mr. Bloomer, who worked in the Bank at Chilton at the same time (R. 161); Mr. Morrissey of Chilton, Superintendent of Schools there for 36 years (R. 86-88); Dr. Guenther, dentist, (R. 84-86); Mr. Berger now with First Wisconsin Trust Company (R. 88-90) and Mr. Spransy (R. 112-114) then office and business associates; Mrs. Nyberg, high school English teacher (R. 90-92); Miss Stendler, social worker, (R. 92-94); Mr. and Mrs. Arnold, neighbors in the apartment building where they lived (R. 108-109); Mr. Lowum, superintendent of the apartment building (R. 107); and Reverend Lyter, Pastor of Washington Park Presbyterian Church, who knew both Mr. Westphal and his family and his father's family (R. 114-115).

Respondent contends that an inference that Mr. Westphal did not die at the time found by the jury may be drawn from testimony relating to financial irregularities and that he had failed to remit insurance premiums and had left two letters admitting the default.

The amount claimed unremitted was not pleaded as a defense (R. 11-15), no itemized statement or bill of particulars has at any time been presented, and no ac-

tion has at any time been filed in any court to establish the guilt and amount thereof. Mr. Westphal was not the only one who took in premiums. He was out on business, had to make trips, and others took in money (R. 82, 99, 112, 119). Respondent put in testimony on this matter in a disconnected fashion, without an itemized statement to refer to, covering 225 pages of transcript (R. 122). A great many items were referred to. At the conclusion of the testimony no one could tell if the account showed a balance one way or the other. Respondent in the note (R. 122) in preparing the record explains to have set out these 225 pages in narrative form would make difficult any attempt to summarize the results. The jurors were the judges of this testimony. Many items, as shown by a close analysis of the schedule prepared on appeal by respondent, (R. 122-125), are open for dispute and for different inferences, and were issues for the jury (R. 17). The most the schedule shows unremitted is $772.93. Respondent contended the evidence showed $1500. The most ever claimed was about $2400. The amount is not at all clear, is disputed, and is open to reduction. Only 91 daily reports of remittances of Mr. Westphal (R. 264), of which Ex. S-64, R. 197-203, is a sample, were produced at the trial, and it is not known what an examination of the other daily reports and further accounts would show, were the amount of the indebtedness pleaded as an issue and tried on the merits. The issue tried in this lawsuit was but one, and that was,—Did F. Gilbert Westphal die shortly after last seen.

The representatives of Mr. Westphal's estate have at no time been sued on this accounting, nor has a claim therefor been filed against them in any court. Mr. Westphal has at no time been indicted for embezzlement. No warrant was ever asked for him. Respondent, or its representatives, and the bonding company, did not at the time,

and have at no time, asked the police, detectives or sheriffs to locate him and bring him back. Although irregularities were charged, the fact remains, there never was, and there never has been, a move on the part of anyone to prosecute Mr. Westphal (R. 100, 105-107, 111). The jurors could properly consider this evidence to reach their conclusion.

Mr. Beck representing the bonding company was not at all sure and felt there was much left to be explained, and they were very reluctant to pay the claim. There were others who worked in the cashier's cage many times when Mr. Westphal was not there (R. 82, 53, 57). In letters written by Mrs. Westphal to Mr. Beck, offered by respondent, she stated her contentions,—"There may be someone else just as much to blame." (Ex. D, R. 176, 58). "In spite of the letter I believe him innocent" (Ex. F, R. 179, 59). "I still believe there are things we do not know about" (Ex. G, R. 181, 59).

What made it possible to maintain in the branch office, contrary to policy requirements, a system to collect the entire premium or only a part thereof, and then remit only a portion of the amount due, without notice first given to the Home Office by the policyholder and getting a written consent thereto, was not satisfactorily explained (R. 112-113, 119, 130).

Respondent, although charging Mr. Westphal with taking money, offered no testimony to explain the use he or his family made of this money over and above his earnings and family income. Respondent showed no motive for taking money. His income was ample. In 1931 his salary as cashier was $150 a month. In addition his earnings in 1931 writing life insurance averaged $110 a month. Rent from a home in Chilton added $35.00 a month; his wife had income from lands of $50.00 a month. Total family

income was $345 a month. In 1931 living costs comparatively were low. They did not live extravagantly. The rent was $65.00 a month, no maid; Mrs. Westphal sewed clothes for the children and herself; he came home for meals at noon; they did not entertain; they did not live beyond their income, the children were then young. He had a 1929 Essex car. He did not go to gambling places, speculate on the stock market, smoke or drink, except very little socially; they were not buying a home (R. 28, 29, 30, 31, 32, 50, 55, 59, 61, 87, 89, 91, 95, 99, 102, 107, 108, 109, 113, 114, 115, 179).

All his daily reports, of which Ex. S-64, (R. 197, 203), is a sample, had been sent to the Home Office and had been checked and entered in the general cash journal and the policyholders' cash journal and record cards, and checked with other records at the Home Office from day to day (R. 132-133).

Mr. Westphal had positions of financial trust. For over eight years prior to coming to Milwaukee he had worked in the State Bank at Chilton, of which his father-in-law was president. He was promoted to cashier (R. 26-27). The vice-president (R. 101), and another employee (R. 161) who were in the bank at the same time, testified there were no complaints about his work. He was elected by the people of Chilton to the School Board, was made Treasurer, handled about $50,000 a year, nothing irregular. In the winter of 1929-1930 he was placed in charge of the Greenleaf State Bank, with assets of $300,000, on the recommendation of his father-in-law, which position also required the approval of his trustworthiness by the Banking Department of Wisconsin. The cashier testified there were no irregularities (R. 100-101). At Chilton he had also sold insurance, including life insurance for respondent (R. 27). Of the many witnesses who had contact with him at different periods of his life in different ways,

no one knew why he should be involved in unworthiness in handling money or his business affairs (R. 26, 27, 30, 31, 92, 94-97, 110, 114-115).

Significant in connection with any claim for loss, if Mr. Westphal was at fault, is the financial ability by Mrs. Westphal, her family, his father, and a brother to help make such a loss good. They all loved him. He knew this and he had reason to believe they would assist him, if necessary. He had no reason to fear it was necessary to endure absence. Mrs. Westphal at the time owned valuable lands and had over $4,000 cash in the bank (R. 31, 54, 102, 115). He was bonded. Under such conditions any man would know any loss could be repaid, and if at fault and arrested, he would most likely be placed on probation, as is usually done with a family man on first offense. He had many friends. Advertisements were run in the Chicago papers, the newspapers he was in the custom of reading and can be purchased in all important places, telling him to return (R. 52-53, 28, 32, 33, 85, 87, 89, 108, 112, 114).

Mrs. Westphal did not approve of his employment at the Kansas City Office; she did not like the people they employed, wanted him to obtain employment elsewhere, and he did seek a connection at other places (R. 31, 32, 33-34).

The two letters offered by respondent were typewritten, no one saw them typed or mailed (R. 54, 141). The letter to Mrs. Westphal, with the key to the automobile, (Def.'s Ex. F, R. 180, 60-62), was found in the Westphal mailbox near noon on November 6 by her brother-in-law. It did not come as mail (Ex. A, R. 172, 57, 62). Mrs. Westphal testified: "We all, all of my family and all of his family, had doubts at that time about that communication having come from him." Mr. Westphal had never written to her

on a typewritter, that was one thing he did not do (R. 54, 82). Mrs. Westphal did not recognize the signature "Gil" on Def.'s Ex. T, the letter to Mr. Madden, (R. 166, 205, 139), which was postmarked at Milwaukee, November 6, 1931, at 10:00 A. M., and received by Mr. Madden in the mail that day. Both letters are dated November 4, 1931. On that day Mr. Westphal was at the office and came home for the evening in the usual manner. There was nothing different about his bearing or mental attitude. There being no school the next day on account of Teachers' Convention, he took his oldest daughter and wife downtown that evening, they stopped for ice cream, walked up the Avenue, went for a ride. He was in his ordinary way, they had a happy evening together (R. 34, 35, 36, 110). The opinions about the letters and the inferences to be drawn therefrom were questions for the jury.

The first word of a flight by Mr. Westphal originated in respondent's office at a time when there was no occasion for Mr. Westphal to be missing. This was on the afternoon of November 5, 1931, when Mr. Madden of respondent's office telephoned Mrs. Westphal her husband "flew the coop," that she should call her father to come down (R. 44-45, 53, 82, 83). Mrs. Westphal had not been looking for her husband, she did not expect him to be missing. They had arranged he was to come home at noon and take her to a friend's home, but later he had telephoned he was going to Racine, Wisconsin, and could not do this (R. 40). Mrs. Westphal, later in the afternoon of November 5, telephoned to Chilton and asked her father to come, and he and other relatives and friends came to her home that evening. Mr. Madden and Mr. Lippert, branch manager and city manager for respondent, that evening parked their car on the street across from the Westphal apartment and were there for a long time. Mr. Lippert went in

after her father arrived and wanted him to make alleged losses good (R. 46-49, 82-83). The auditor had been there October 22 to 26, everything had been satisfactory but one item (R. 120, 130, 131). The auditors returned after November 7 to make a further audit and no shortage was claimed by the auditors until after that (R. 121, 131, 145). Mr. Madden and Mr. Lippert were the men who promoted drinking parties after insurance meetings at places and clubs during prohibition days, still there was always plenty to drink (R. 83, 113-114), and at one of these parties Mr. Westphal, who was of small physical size and slight stature (R. 27, 55), and could not stand strong drink (R. 31, 83) came under the influence thereof, lost control of himself, and became the victim of the shameful orgy brought out by respondent in cross-examination (R. 75, 76, 83, 113-114). Mr. Lippert had also followed Mr. and Mrs. Westphal to Chilton and appeared there uninvited on Sundays when they were there for the weekend, which was disliked, unwelcome, and peculiar (R. 164).

It is also disputed that Mr. Westphal was last seen about 7:30 P. M. on November 5, 1931, putting his automobile in his garage a block from his home and leaving with a valise in his hand (R. 282, 152-153). The group of people at the Westphal home that evening was looking for him and the automobile, none of them knew Mr. Westphal had been seen leaving with a valise at 7:30 P. M. at the garage. Mr. Madden in the afternoon had telephoned Mrs. Westphal he "flew the coop" and after that she kept in touch with the garage (R. 44-45, 53). The automobile was not in the garage in the evening. Mrs. Westphal's sister and brother-in-law came over to stay all night at the Westphal home, and he put his car in Westphal's stall that evening, and he took a valise out of the garage. When Mr. Westphal's automobile was returned, no one knew that evening (R. 47-51, 163-164).

The keys of the automobile and letter for Mrs. Westphal were not left in their mailbox at the apartment until forenoon of November 6, where they were found by the brother-in-law at noon (R. 54, 57, 62). It does not seem probable that if Mr. Westphal wanted to flee and was seen leaving with a valise at 7:30 P.M., he having been reported by Mr. Madden to Mrs. Westphal that afternoon as having "flown the coop," that he would be loitering around until the next day. The jurors were the judges of this evidence.

Mrs. Westphal and others concerned turned over all papers and endeavored to solve the question (R. 58, 63, 175). She was bewildered. She was told her husband was short in his accounts, she wondered what became of the money. She believed another office connected with the Madden Office was responsible (R. 165-166). She worked with respondent and the bonding company, giving some reliance to their charges, with the hope her husband might be returned to her. She had doubts as to the charges, so did the bonding company (R. 53, 57, 82, Exs. D, F, G; R. 176, 179, 181, 58, 59). She did not know what to believe and what to do. Sometimes it looked all black to her (R. 75). She wanted him back, if he could be had back. She did not want her husband dead. But time goes on, no word comes, no trace is found, and after seven years the law speaks death. What mother does not hope and hope for herself and for her children, and keep on hoping against hope, for the return of a missing father. At one time she asked for a circle of prayer (R. 67). Once she wrote Mr. Westphal's father, which was brought out by respondent on cross-examination (R. 77),—"Every night I snuggle little Janice up to me and just because she is part of him and somehow I want her near to me all night. Poor babies don't know. I make them always kiss me once for daddy and once for myself, and every night

they ask God to send daddy home so mommy won't cry any more." She loved her husband. Mr. Westphal knew that love, he had felt it too.

The issue presented by the evidence in the record in this case under the Wisconsin decisions was a question of fact for the jury, as held by the District Judge and also Circuit Judge Evans in the dissenting opinion. This was a Wisconsin contract. The action was commenced in the State court, and by respondent removed to the Federal Court. Under *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, the Wisconsin law applies.

In Wisconsin a person who has been missing from his home and family and unheard of for seven years is presumed to be dead. *Ewing* v. *Metropolitan Life Ins. Co.,* 191 Wis. 299, 300-301, and cases there cited. There is no presumption as to either life or death at any particular time during the seven years. *Whiteley* v. *Equitable Life Ass. Soc.,* 72 Wis. 170, 176-178; *White* v. *Brotherhood of Locomotive Firemen,* 165 Wis. 418, 422.

Petitioners here did not have to prove death, only the fact of the time or about the time when such death occurred:

> "But by delaying the action and trial until after such expiration of the seven years, such proof of death was dispensed with by such presumption of the fact; and hence the only remaining fact to be established by the evidence was the time, or about the time, when such death occurred." *Whiteley* v. *Equitable Life Ass. Soc.,* 72 Wis. 170, 174.

> "On this record the insured is dead. (Citing case.) He was living on December 30, 1915, and seven years later was dead. Plaintiff, in her effort to fix, within that period, a time of death, has the benefit, given by the law, of the presumption of death, and on this record the established fact of death. If she were called

upon to prove, unaided by the presumption, both the fact and the time of death, her task would be difficult indeed. But, given the fact of death, and that it occurred within a certain period of time, she has the comparatively lighter task of fixing merely the time of death."

"Under the authorities, it was for the jury to say under all the evidence whether the death occurred within the life of the policy and on or about December 30, 1915, as contended by plaintiff." (*Griffin* v. *N. W. Mut. Life Ins. Co.*, 250 Mich. 185, 194-195.

The Supreme Court of Wisconsin has steadfastly held over the period from 1888 to date, 72 Wis. to 216 Wis., and it is still the law, that the question of the time of death during the seven-year period is for the jury, to be determined from the probabilities disclosed by the evidence. See,—*Whiteley* v. *Equitable Life Ass. Soc.*, 72 Wis. 170, 174, 178, 179:

"That such fact need not necessarily be established by direct evidence, but might be established by circumstantial evidence,—by inferences from the facts and circumstances surrounding his disappearance. All this seems to be in accordance with well-settled rules of law."

"In civil actions, courts and juries are frequently called upon to determine facts from mere probabilities disclosed by the evidence;"

"It was simply for the jury to determine, from the facts and circumstances in the case, when such presumed death did occur."

Wisconsin Trust Co. v. *Wisconsin Marine and Fire Ins. Co. Bank*, 105 Wis. 464, 468:

"The question when such presumed death occurred is to be determined from all the facts and circumstances in the case."

White v. *Brotherhood of Locomotive Firemen*, 165 Wis. 418, 422, 423:

> "In the instant case it is undisputed that White had been unheard of for more than seven years, and the material question is, At what particular time, during the seven years he was unheard of, did he die? This is a question of fact to be determined by the trial court or a jury. *Whiteley* v. *Equitable L. A. Soc.*, 72 Wis. 170."

In the case of *Delaney* v. *Metropolitan Life Ins. Co.*, 216 Wis. 265, 269, the facts and circumstances from which could be made the inference of death on the day of disappearance were the following:

> "In this case the evidence must be such as to warrant the inference that deceased died on the date of his disappearance. Plaintiff relies upon the following circumstances to make a jury question upon this issue: The fact that insured and his wife had always lived together in domestic tranquillity; the fact that he was a steady worker and had a good position; that he had a daily routine; that he had religious affiliations and attended church regularly with his wife; that his daily routine was nearly invariable and included appearance for work at certain definite hours, and the return to his home at the end of his work. Insured was not a wanderer, but a man who spent his leisure hours at home with his wife. There were no quarrels or other crises in his affairs to explain the sudden disappearance. On the morning of the disappearance he prepared for work at the usual hour, kissed his wife, and left at the usual time. From that time the story is a blank. He failed to arrive at work, and he never returned home. He has never since been seen or heard from."

Each case has different facts and circumstances to affect the strength of the inference. This is referred to in the *Delaney case* in considering that no trace of the body was

found in going from home to the place of work, 216 Wis. 265, 270:

> "While this factor might well have been considered by a jury to weaken the inference, we consider that it merely affects the strength of the inference, and does not, as a matter of law, render speculative the conclusion that death occurred on this day."

Circuit Judge Evans in the dissenting opinion states the ~~covert~~ correct rules (R. 286-287, 126 F. (2d) 76, 80):

> "Each case has its separate factual background. The basis of the many decisions which have left the date of death to the jury, is the recognition that mental states, intentions, explanations of suicide, and disappearances, are factual in their nature. The facts bearing on mental states, intentions, suicidal causes, etc., and the inferences which flow from such facts, support juries' verdicts just as legitimately and soundly as physical evidence or the spoken word, the truthfulness of which is contested."
>
> "The last sentence of the letter (set forth in the majority opinion) to the wife, the mother of his children, might well have been accepted by the jury, over all other evidence, as indicative of a final disappearance from his home and family. It was written under such sad and solemn circumstances as to be prognostic and foreboding. From it the jury might have legitimately drawn an inference of contemplated self-destruction of life by the insured."

See, also, *Mutual Life Ins. Co.* v. *Louisville Trust Co.*, 207 Ky. 654, 269 S. W. 1014, 1016:

> "Necessarily this evidence had to be circumstantial. Direct evidence was not required." (Cases cited).
>
> "In determining the time of death, any conditions from which a persumption as to the continuance or destruction of life would arise are proper to be considered, especially where they tend to strengthen

evidence of a character which, considered by itself, would create a reasonable probability of death at a certain time."

"Under the facts proven, Wallwork was presumed to be dead. When he died was a fact to be found by the jury. His letters indicating his intention to commit suicide were themselves some evidence of that intention. He may truly have had no such intention; that was a question for the jury. If, however, he had come to the conclusion that life was not worth living, he was face to face with one of the deadliest perils that can beset an unsuccessful and disheartened man. It is a matter of common knowledge that many suicides leave written statements of their intention to destroy themselves. In the absence of anything to the contrary, the presumption is that these letters correctly stated his intention. Whether they did or not, and whether he committed suicide then or not, were questions for the jury."

Kansas City Life Ins. Co. v. *Marshall*, 84 Colo. 71, 268 Pac. 529, 532, 533, is in accord with Wisconsin:

"While the evidence in some respects is conflicting, it was for the jury to determine therefrom whether it might presume that the death of the insured occurred before the expiration of the 7-year period and within the life of the policy."

"Any facts or circumstances relating to the character, habits, condition, affections, and attachments which usually control the conduct of men, and are the motives of their actions, are competent evidence from which may be inferred the death of one absent and unheard from, whatever has been the duration of such absence. And the learned judge says that a ruling excluding such evidence would ignore the motives which prompt human actions, and forbid inquiry into them to explain the conduct of men."

Bradley v. *Modern Woodmen of America,* 146 Mo. App. 428, 124 S. W. 69, 75, is in accord with Wisconsin:

> "In determining the question of whether his death occurred prior to said date, the jury should take into consideration his condition in life, character, habits, and domestic relations, the circumstances attending his departure from home, and the fact that none of his friends, relatives, or acquaintances have heard of him since; and unless, in view of those circumstances and others which may appear in evidence, the jury believe from the evidence Mills died prior to February 2, 1901, the verdict should be for defendant."

Dobelin v. *Maccabees,* 171 Wis. 54, 58, a 4-3 decision accepted by the majority of the Court of Appeals, does not carry the presumption of death from seven years' absence from home life or family ties. What distinguishes that case was stated by the trial court (R. 235), and also in *Delaney* v. *Metropolitan Life Ins. Co.,* 216 Wis. 265, 271:

> "It was pointed out in that case, however, that the insured was a wanderer 'with but the slightest of home ties, and these were naturally decreasing rather than strengthening as time went on'."

See, also, 17 C. J. 1170, Death, Sec. 9 c.:

> "*Absence from Residence.* To raise a presumption of death from long absence unheard of, it is necessary that the person in question shall have been absent from his place of residence."

Under Wisconsin law petitioners need not prove, in order for the jury to find that Mr. Westphal died at or about the time or shortly after when last seen, that he at that time encountered some specific peril that would account for his death at that time, or that he came within the range of some impending or immediate danger which might reasonably be expected to have destroyed his life.

The law in Wisconsin does not impose such "arbitrary requirements." See, —*Delaney* v. *Metropolitan Life Ins. Co.*, 216 Wis. 265, 270, citing *Fid. Mut. Life Assn.* v. *Mettler*, 185 U. S. 308, 319. Here, however, we have evidence that Mr. Westphal was very ill the night before. His wife feared it was appendicitis. He was also ill on November 5th. (R. 36, 38, 42-44). In addition, he was treating for a social disease, a chronic case, which then required attention (R. 75-76, 82-83, 113-114). For their verdict the jury might well have accepted this evidence of which and the inferences to be drawn therefrom the most favorable view must be taken for petitioners. Mr. Westphal was a man of small physical size and slight stature, height about five feet, eight inches, weight from 129 to 132 pounds (R. 27, 55).

In Wisconsin proof is also not required of diligent search to establish the presumption of death from absence from home and family; it is enough to show absence and lack of tiding for seven years. *Delaney* v. *Metropolitan Life Ins. Co.*, 216 Wis. 265, 268; *Ewing* v. *Metropolitan Life Ins. Co.*, 191 Wis. 299, 301.

It is also the law in Wisconsin that the presumption of death is not rebutted by proof that the absentee was a fugitive from justice. Only proof that he was alive within the period will rebut it. The mere fact that one was a fugitive from justice is insufficient to prove the continued existence of a person who is absent for over seven years. See,—*Ewing* v. *Metropolitan Life Ins. Co.*, 191 Wis. 299, 301, and *Hansen* v. *Central Verein*, 198 Wis. 140, 144. Mr. Westphal was not a fugitive from justice. No warrant had been asked for him (R. 100, 105-106, 111).

Other states hold differently on these matters of specific peril, diligent search, and fugitive from justice. Petitioners under *Erie R. Co.* v. *Tompkins*, 304 U. S. 64,

are entitled to have applied, as was done by the trial judge and pointed out by Circuit Judge Evans dissenting, the favorable law in the Wisconsin decisions.

In the *Delaney Case,* 216 Wis. 265, there was no evidence to show how the insured died. In disappearance cases it cannot be determined to a certainty how death occurred. It was not necessary for the jury to reach their verdict in this case to determine how Mr. Westphal died, although there was evidence which the jurors might have accepted as adequate to find that death took place on November 5, 1931, or shortly after, from being very sick the night before, which his wife feared was appendicitis, and also being sick the next day, or from his chronic illness, or from some untoward occurrence, or from self-destruction, as stated by Circuit Judge Evans (R. 286-287) the jury might have concluded from the letter, Def.'s Ex. F; R. 60-62, 180, offered in evidence by respondent. The inference of death might arise from disappearance under circumstances inconsistent with a continuation of life even though exposure to some particular peril was not shown. *Fid. Mut. Life. Assn.* v. *Mettler,* 185 U. S. 308, 319.

The only issue was the time of death. The facts and circumstances which tended to fix the time of death at all tended to fix it as found by the jury. No one saw Mr. Westphal or found any trace of him after November 5, 1931. There was no response to the advertisements telling him to return. As is said in *Whiteley* v. *Equitable Life Ass. Soc.,* 72 Wis. 170, 175:

> "The record reveals no facts and circumstances as having transpired after that date tending to fix some subsequent time during the seven years as the probable period of his death."

It is not human for a man who loved his wife and three lovely children, who had a dear father and mother, four brothers, a sister, family ties that could help him, on affectionate terms with all, to secrete himself without death from such precious ones and from all that is dearest and worthiest in this life. No such man would stay away from all that for the amount here in dispute. There was no warrant out for him. No such man could endure such absence. Absence and total blankness to all without death as found by the jury seems improbable in his life. He took nothing from his home. It was the province of the jury to draw the inference of fact from all the evidence. Proof as to the time of death,—

> "might be established by circumstantial evidence, —by inferences from the facts and circumstances surrounding his disappearance. All this seems to be in accordance with well-settled rules of law."
>
> "It was simply for the jury to determine, from the facts and circumstances in the case, when such presumed death did occur." *Whiteley* v. *Equitable Life Ass. Soc.*, 72 Wis. 170, 174, 179.

A finding can rest upon a preponderance of probabilities. See, — *Schwartz* v. *Zellmer*, 209 Wis. 583, 587, and cases there referred to.

> "The matter of the 'preponderance of the evidence' is a jury question, and not a law question." *Duncan* v. *Montgomery Ward & Co.*, 108 F. (2d) 848, 851, (CCA 8).

Under the long settled common law rule governing jury trials, stated in *Gunning* v. *Cooley*, 281 U. S. 90, 94, and other authorities there cited, on motion of respondent to direct a verdict under new Rule 50 (b), it was necessary for the Court of Appeals to assume that the evidence for the petitioners "proves all that it reasonably may be found sufficient to establish, and that from such facts there should be drawn in favor of the latter all the inferences that fairly are deducible from them."

> "If the record discloses *substantial* evidence from which reasonable men *might* find the material, controverted issues in favor of the plaintiff, it is improper to direct a verdict for the defendant." *Flynn* v. *Crume,* 101 F. (2d) 661, 662 (CCA 7). (Italics supplied).

In the case at bar, in re-examining the fact tried by the jury, the majority of the Court of Appeals did not mention and gave no consideration to this firm-clad rule of the common law. In *Storck* v. *Northwestern Natl. Cas. Co.,* 115 F. (2d) 889, 890, (CCA 7), the Court states the Wisconsin rule is that in passing on a motion to direct a verdict, the evidence and reasonable inferences to be drawn therefrom must be considered in the light most favorable to the party against whom the motion is directed, citing *Trautmann* v. *Schefft,* 201 Wis. 113. To the same effect are, — *Geffert* v. *Kayser,* 179 Wis. 571, 573; *Engstrum* v. *Sentinel Co.,* 221 Wis. 577, 578.

When this Court adopted Rule 50 (b), to preserve the sanctity of the Seventh Amendment, the above was a rule of the common law to remain inviolate. Congress in providing for the new Federal Rules of Civil Procedure, (Act of June 19, 1934, c. 651, Sec. 2, (48 Stat. 1064), U. S. C., Title 28, Sec. 723c), expressly enacted:

> "*Provided, however,* That in such union of rules the right of trial by jury as at common law and declared by the seventh amendment to the Constitution shall be preserved to the parties inviolate."

And this Court, pursuant to said Act, in its order of June 3, 1935, noted especially for its advisory committee in undertaking the preparation of the new rules for a system, —

> "maintaining inviolate the right of trial by jury in accordance with the Seventh Amendment of the Constitution of the United States and without altering substantive rights."

In considering the sufficiency of evidence the decisions direct the inquiry as to whether there was "*substantial evidence,*" which term has recently been defined by this Court as meaning:—

> "Such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." See, — *Consolidated Edison Co.* v. *N. L. R. B.*, 305 U. S. 197, 229.

This definition is accepted in Wisconsin *verbatim.* See, —*Jasperson* v. *Ind. Comm.*, 231 Wis. 142, 146, citing this case and quoting this definition. It will be noted the word "might" is used, and not "must," and that it is not mandatory on the jury to reach the conclusion from such evidence opposite to that which they might reach, or that conclusion which the respondent contends they should reach.

Here there was substantial evidence from which the jury might have found, and did find, the factual problem in favor of petitioners. The trial judge so held, so did Judge Evans in his dissenting opinion, and when the majority of the Appellate Court was satisfied that "unmistakably, there are two inferences made from the evidence," it found there was substantial evidence from which the jury might have reached its conclusion. The power to decide in the first instance whether there was substantial evidence which the jury might accept as adequate to support their verdict, under the common law and Rule 50 (b) vests in the District Court, which had the better opportunity, the same as the jury, to see and hear the witnesses and to better judge the testimony. The Circuit Court of Appeals cannot disturb the discretion of the District Court, unless there was error as a matter of law. The Court of Appeals cannot become the jury. In *Story Parchment Co.* v. *Peterson Parchment Co.*, 282 U. S. 555, 564, 566, this Court said:

"Juries are allowed to act upon probable and inferential, as well as direct and positive proof."

"But this conclusion rested upon inferences from facts within the exclusive province of the jury, and which could not be drawn by the court contrary to the verdict of the jury without usurping the functions of that fact finding body."

"And the finding of the jury upon that question must be allowed to stand unless all reasonable men, exercising an unprejudiced judgment, would draw an opposite conclusion from the facts."

See, also, the case of *Bohner* v. *Great Atlantic & Pacific Tea Co.*, 211 Wis. 501, 503:

"If there is credible evidence in the case which sustains the findings of the jury, the court was in error in setting aside the answers to the questions in the special verdict even though the evidence largely preponderated against the findings of the jury. It is not enough that the evidence, contrary to the jury's finding, preponderates or has a greater convincing power; it must make the evidence which tends to sustain the verdict incredible."

In the two courts below, on the record, the trial judge and a Circuit Judge agreed that the jury might draw the conclusion reached from the evidence, and two Circuit Judges agreed there are two inferences made from the evidence. This bears out that fairminded men can honestly reach different conclusions from the evidence. Where uncertainty as to the time of death of a missing person during the seven-year period of absence "arises from a conflict in the testimony or because, the facts being undisputed, fair-minded men will honestly draw different conclusions from them, the question is not one of law but of fact to be settled by the jury." *Gunning* v. *Cooley*, 281 U. S. 90, 94; *Tex. & Pac. Ry. Co.* v. *Harvey*, 228 U. S. 319, 324, 325; *Richmond & Danville Railroad* v. *Powers*, 149 U. S. 43, 45.

It is only where the evidence upon the issue "is all on one side or so overwhelmingly on one side as to leave no room to doubt what the fact is" that "the court should give a peremptory instruction to the jury." See, — *Gunning* v. *Cooley,* 281 U. S. 90, 94.

Point "B".

B. The Court of Appeals under the common law and the Seventh Amendment could not disregard the ordinary formulae concerning the province of judge and jury and usurp the function of the jury and decide under Rule 50 (b) what inference was to be made from the evidence, that was the province of the jury as the fact finding tribunal.

When the majority of the Court of Appeals ruled "that the ordinary formulae concerning the province of judge and jury are of little value in a case of this nature," it did so without authority in the law. No authority is cited. It is not in the common law or the Seventh Amendment to the Constitution of the United States, nor can such precedent be invoked under new Rule 50 (b). The sole issue reviewed by the Court of Appeals was the action of the District Court taken on respondent's motion under Rule 50 (b). There is uncertainty as to the power of the Circuit Courts of Appeals under Rule 50 (b), as has been pointed out in *Conway* v. *O'Brien,* 312 U. S. 492; *Berry* v. *U. S.,* 312 U. S. 450; and *Halliday* v. *U. S.,* 86 L. Ed. 393. Rule 50 (b) should not be given a construction permitting the Court of Appeals to invade the province of the jury. Under the Constitution the province of the jury as a fact finding body remains inviolate. There is not one set of rules for determining the province of the judge and jury for one case, and still another set for another case, and still a different set when the factual

problem happens to be the time of death of a missing person during the seven-year period. Recently on the application of Rule 50 (b) to the province of judge and jury, this Court said:

> "Rule 50 (b) goes further than the old practice in that district judges, under certain circumstances, are now expressly declared to have the right (but not the mandatory duty) to enter a judgment contrary to the jury's verdict without granting a new trial. But that rule has not taken away from juries and given to judges any part of the exclusive power of juries to weigh evidence and determine contested issues of fact — a jury being the constitutional tribunal provided for trying facts in courts of law. Here, although there was evidence from which a jury could have reached a contrary conclusion, there was testimony from which a jury could have found these to be the facts: * * *" *Berry* v. *U. S.*, 312 U. S. 450, 452-453.

If Rule 50 (b) gives the Court of Appeals power to decide what inference is to be made from the evidence, the rule is in violation of the Seventh Amendment to the Constitution of the United States, and petitioners are deprived of the right of trial by jury, the method of trial guaranteed them by the Constitution on a question of fact. The fact tried by the jury then has not been re-examined according to the rules of the common law.

> "The jurors are the sole judges of the facts and no better method of deciding controverted facts has yet been devised in our system of jurisprudence." *Southern Fruit Distributors, Inc.* v. *Fulmer*, 107 F. (2d) 456, 458, (CCA 4).

This Court has clearly defined the province of judge and jury:

> "The appellate court is not a jury for the trial of a case." *Texas & Pac. R. Co.* v. *Harvey*, 228 U. S. 319, 325.

> "It is to be remembered a jury is a tribunal constituted by law as the court is, its function has as definite sanction as that of the court, and it alone is charged wih the consideration and decision of the facts of a case. And the duty is of such value as to have been considered worthy of constitutional provision and safeguard." *Schaefer* v. *U. S.*, 251 U. S. 466, 476.
>
> "It is as much within the province of the jury to decide questions of fact as of the court to decide questions of law. The jury should take the law as laid down by the court and give it full effect. But its application to the facts, and the facts themselves, it is for them to determine. These are the checks and balances which give to the trial by jury its value. Experience has proved their importance. They are indispensable to the harmony and proper efficacy of the system. Such is the law. (Citing numerous cases)." *Hickman* v. *Jones,* 9 Wall., 76 U. S. 197, 201-202.

Which of two inferences made from the evidence is to be drawn from the evidence is the province of the jury, not the Court of Appeals. It was so stated in *Phoenix Ins. Co.* v. *Doster,* 106 U. S. 30, 32:

> "It is enough to say that the testimony was ample to enable each party to go to the jury upon the substantial issues in the case. The motion, at the close of the plaintiff's evidence, for a peremptory instruction for the company was properly denied. It could not have been allowed, without usurpation, upon the part of the court, of the functions of the jury. Where a cause fairly depends upon the effect or weight of testimony, it is one for the consideration and determination of the jury, under proper directions as to the principles of law involved."

The *Delaney Case,* 216 Wis. 265, does not establish the rule that the contentions respondent makes take the case from the jury — it is still a jury question. The most that can be said for respondent's contentions is that they may

affect the strength of the inference as to the time of death as found by the jury, but what inference was to be drawn from the evidence was still for the jury, the fact finding tribunal under the Seventh Amendment of the Constitution. The inferences contended for by respondent to be drawn from the two letters and financial matters are offset by other inferences which may be drawn from the two letters and from any other facts and circumstances in the evidence, and from Mr. Westphal's character, habits, family ties, home life and activities, which all make the time of death as found by the jury most probable. It is for the jury to consider all the facts and circumstances:

> "Conceding that these circumstances justify the inference of consent, (consent to use an automobile), the positive testimony to establish a contrary conclusion cannot destroy the probative force of such circumstances. Such evidence might overcome them, might outweigh them, but it cannot take them out of the case. No matter what evidence is placed on the other side of the scales, this evidence remains, and all of the evidence in the case must be weighed and balanced by the jury."
>
> "A determination of the weight of evidence is a jury function."
>
> "'If there was any evidence warranting submission of the question to the jury, there is enough to support the finding on appeal'."
>
> "The jury had a right to take all of the circumstances into consideration." *Christiansen* v. *Aetna Cas. & Surety Co.,* 204 Wis. 323, 327.

> "The weighing of the evidence is distinctly a function of the jury. While there are many facts, considerations, and circumstances which seem to render improbable a finding that the defendant's conduct was the controlling cause of plaintiff's loss of his wife's affections, nevertheless it plainly was the func-

tion of the jury to weigh all of the facts and circumstances and to come to such a conclusion as they might be persuaded was supported by the weight of the evidence." *Maahs* v. *Schultz,* 207 Wis. 624, 629-630.

The province of the Appellate Court sitting as a court of review for errors of law is not to balance the plaintiffs' evidence against the defendant's evidence, to cast aside the safeguard and inhibitions of the Seventh Amendment, to ignore substantial evidence which the jury might accept as adequate for their verdict, and to usurp the function of the jury and to substitute its discretion for that of the District Court under new Rule 50 (b). The balancing and the effect and weight of the evidence, and what inferences are to be drawn therefrom are for the jury. This is not a question of law.

> "It is easy to accept as legal grounds for dismissal what after all are the somewhat unconscious inferences made from the facts. But the function of making such inferences must be reserved for the jury." *La Guerra* v. *Brasileiro,* 124 F. (2d) 553, 554 (CCA 2).

> "It must be noted that the fact that the court considered the jury's finding against the preponderance of the evidence would not warrant discarding that finding. If there was any credible evidence which reasonably admitted of inferences sufficient to sustain the jury's finding then what were the proper inferences to be drawn was for the jury, and its findings could not be discarded by the court, * * *" *Webster* v. *Krembs,* 230 Wis. 252, 256.

> "If the evidence is conflicting, or if the inferences to be drawn from the credible evidence are doubtful and uncertain, and there is any credible evidence which under any reasonable view will support or admit of an inference either for or against

the claim of contention of any party, then the rule that the proper inference to be drawn therefrom is a question for the jury should be firmly adhered to, and the court should not assume to answer such question upon a motion for direction of verdict, or by substituting another answer after the verdict is returned." *Trautmann* v. *Schefft*, 201 Wis. 113, 115-116.

"'If there is any credible evidence, which under any reasonable view will support or admit of an inference for or against the claim or contention of any party, then what is the proper inference to be drawn therefrom is for the jury and the court should not assume to answer such questions by substituting another answer after the verdict is returned'." *Borg* v. *Downing*, 221 Wis. 463, 465.

"It is the settled law of this state that where there is any credible evidence which, under any reasonable view, will admit of an inference either for or against the plaintiff, then the proper inference to be drawn therefrom is a question for the jury." *Dauplaise* v. *Yellow Taxicab Co.*, 204 Wis. 419, 421.

Point "C".

C. The District Court could not properly allow the deduction in the judgment made for alleged indebtedness of the insured from the insurance recovered by the widow.

The District Court could not properly make findings of fact and conclusions of law supplemental to verdict (R. 245-247) and allow a deduction of $1500, plus interest, as indebtedness of the insured for unremitted premiums, from the insurance recovered by the petitioner Gladys M. Westphal, the insured's widow (R. 251), where the claim for deduction was not pleaded as an issue, was not raised on the trial, and was not tried on the merits. (See Answer, R. 11-15, and Stipulation of parties, R. 260-261).

The claim was not asserted until after order for judgment, and was then brought up on motion by respondent on behalf of and for the benefit of the Hartford Accident and Indemnity Company, who had bonded Mr. Westphal and made a voluntary settlement with respondent, (R. 244). The findings of the District Court were on issues between parties who were not parties to the action. Petitioners are entitled to a fair trial on the merits on the issues involved before such a deduction could be ordered. The trial court could not assume the issues as undisputed.

The alleged claim of the Hartford Company against Mr. Westphal is not deductible from the widow's insurance under the Wisconsin Statutes and decisions. The widow takes the insurance payable to her, free from the creditors of her husband. The insurance is also exempt from the creditors of the insured. *Wisconsin Statutes*, 1929 and 1939, Sec. 246.09, (formerly Sec. 2347), and 1939, Sec. 272.18 (19). (See Appendix.) See also, *Cannon* v. *Lincoln Natl. Life Ins. Co.*, 208 Wis. 452, 454, 455; *First Wis. Natl. Bank* v. *Roehling*, 224 Wis. 316, 324; *First Wis. Natl. Bank* v. *Strelitz*, 209 Wis. 335, 338, 339; *Allen* v. *Central Wis. Trust Co.*, 143 Wis. 381, 384, 385.

The words used in the policies, under which the trial court made the deduction, "any indebtedness to the company, including loans and interest accumulation," (R. 246), cannot properly be construed to include any and all forms of indebtedness of the insured not arising out of the insurance, but only indebtedness connected with the insurance, such as premium notes, premium extensions, and so on. See *Anson* v. *New York Life Ins. Co.*, (Ill.), 96 N. E. 846-847, and *Union Central Life Ins. Co.* v. *Woods*, (Ind.), 37 N. E. 180, 183.

The deduction having been made by the trial court from the insurance recovered by the widow (R. 251), the correctness thereof was raised by her on a cross-appeal and errors there assigned (R. 257-261), but on account of the view taken by the Court of Appeals, no ruling was made on this question, (R. 280, 282, 288), being subsidiary to recovery by petitioners of judgment herein.

Conclusion.

It is therefore respectfully submitted that the errors of the Court of Appeals in reversing the judgment of the District Court, are such as to call for the exercise of the supervisory powers of this Court, and that writs of certiorari be issued to review and finally reverse the decision and judgments herein of the United States Circuit Court of Appeals for the Seventh Circuit.

Respectfully submitted,

Arnold C. Otto,
740 North Plankinton Avenue,
Milwaukee, Wisconsin.
Counsel for Petitioners.

APPENDIX.

Federal Rules of Civil Procedure, Rule 50, Motion for a Directed Verdict.

"(b) **Reservation of Decision on Motion.** Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial."

Wisconsin Statutes, 1939, Chapter 246, Property Rights of Married Women.

"**Sec. 246.09. Insurance of husband, son, etc.** (1) Any married woman may, in her own name or in the name of a third person as her trustee, with his assent, cause to be insured for her sole use the life of her husband, son or other person for any definite period or for the natural life of such person; and any person, whether her husband or not, effecting any insurance on his own life or on the life of another may cause the same to be made payable or assign the policy to a married woman or to any person in trust for her or her benefit; and every such policy, when expressed to be for the benefit of or assigned or made payable to any married woman or any such trustee, shall be the sole and separate property of such married woman and shall inure to her separate use and benefit and that of her children, and in case of her surviving the period or term of such policy the amount of the insurance and all proceeds and avails therefrom shall be payable to her or

her trustee for her own use and benefit, free from the control, disposition or claims of her husband and of the person effecting or assigning such insurance and from the claims of their respective representatives and creditors and from the claims of her creditors, whether or not the right to change the beneficiary was reserved or permitted by the terms of the policy. The amount of such insurance proceeds and avails free from the control, disposition or claims of her creditors shall be limited to five thousand dollars. Nothing contained in this section shall be deemed to affect or impair the right of the insured or person effecting such insurance to change the beneficiary of a policy in accordance with the terms thereof, where such right has been reserved." (Formerly Sec. 2347.)

Wisconsin Statutes, 1939, Sec. 272.18, Property Exempt from Execution.

"(19) **Life Insurance.** If a policy of insurance, whether heretofore or hereafter issued, is effected by any person on his own life or on another life, in favor of a person other than himself, or, except in cases of transfer with intent to defraud creditors, if a policy of life insurance is assigned or in any way made payable to any such person, the lawful beneficiary or assignee thereof, other than the insured or the person so effecting such insurance, or his executors or administrators, shall be entitled to its proceeds and avails against the creditors and representatives of the insured and of the person effecting the same, whether or not the right to change the beneficiary is reserved or permitted, and whether or not the policy is made payable to the person whose life is insured if the beneficiary or assignee shall predecease such person; * * *." (Remainder of Section not material.)

FILED
JUN 2 1942
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States

October Term, 1941 - Nos. 1209 and 1210

Gladys M. Westphal, widow of F. Gilbert Westphal, Shirley June Westphal, Janice Beth Westphal, and Ellen Mae Westphal, minors, children of Gladys M. Westphal and F. Gilbert Westphal, by Gladys M. Westphal, their guardian ad litem,

Petitioners,

vs.

Kansas City Life Insurance Company, Kansas City Missouri, a corporation,

Respondent.

Gladys M. Westphal, widow of F. Gilbert Westphal,

Petitioner,

vs.

Kansas City Life Insurance Company, Kansas City Missouri, a corporation,

Respondent.

Brief in Opposition to Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

BERNARD V. BRADY,
Counsel for Respondent,
Kansas City Life Insurance Company.

Index.

	Page
Opinions Below	2
Jurisdiction	2
Statement of Case	2

SUMMARY OF ARGUMENT.

I. In Wisconsin the presumption from 7-years' absence has no evidentiary effect whatever toward proving that the person was dead or alive at any particular time in the 7-year period—that must be established by other affirmative proof 5

II. In Wisconsin an inference from circumstantial evidence must be a rational and logical deduction from established facts; and it cannot be one of several inferences which might, with equal propriety, be drawn from the same facts 6

III. To warrant or sustain a jury's verdict, the evidence must establish the requisite facts to a reasonable certainty 7

IV. When proof to a reasonable certainty depends upon probabilities from circumstantial evidence, the probabilities must preponderate so strongly as to establish the particular fact to a reasonable certainty 7

V. Where circumstantial evidence is relied on, and the circumstances indicate that either of two things might have occurred, one of them being actionable and the other not, no jury issue is made 8

VI. In such a situation, if the evidence leaves the inference of the occurrence of one event as permissible or as probable as the other, the

Summary of Argument—*Continued.*

Page

evidence cannot sustain a verdict for the party having the burden of proof 8

VII. Where, as here, circumstantial evidence alone is relied on, and the established facts permit, with equal consistency or propriety, differing inferences to be drawn, the choice rests on conjecture, and the party with the burden of proof has not made a jury issue 10

VIII. The state of the evidence in this case required the application of that principle 13

Circumstantial evidence which might be considered of "substantial character" may lose that character by additional evidence disclosing further circumstances..... 14

IX. Petitioners' statement of "Reasons Relied on for the Allowance of the Writs" assigns reasons not appropriate to the issue involved 14

(a) There does not exist the asserted failure to have applied the state law 14

(b) There does not exist the asserted conflict in decisions between different circuits 16

The Federal Courts apply the same principle as is applied in Wisconsin 17

In any event, the state law governs, since *Erie Railroad vs. Tompkins*..... 20

(c) There does not exist the asserted conflict between decisions of the same circuit 20

Even if there did, the state law would govern 20

(d) There does not exist the asserted conflict with decisions of this Court.. 20

The same rule respecting circumstantial evidence as applies in Wisconsin is applied in this Court 20

Summary of Argument—*Continued.*

Page

The same rule is also applied generally in the state courts 21

(e) There does not exist the asserted violation of the Seventh Amendment 22

(f) Direction of verdict is consistent with jury trial guaranteed by the Seventh Amendment, under the decisions of this Court and the decisions of Wisconsin 23

X. Petitioners' brief misstates some of the most important points of evidence 23

Misstates the state of the proof:

(a) As to the embezzlement 23

(b) As to premium collection methods.... 24

(c) As to the time and place that Westphal was last seen 24

(d) The state of the proof generally 24

(e) The authenticity of the letters left by Westphal 25

(f) Other matters 25

XI. The petition and brief do not comply with the rules of this Court 26

(a) The statement of the matter involved is not "summary and short" 26

(b) The brief is not "direct and concise" 26

(c) Failure in these respects makes difficult presentation of the real question by respondent 26

XII. Suggestion of suicide 26

(a) Untenable, in view of strong presumption against suicide obtaining in Wisconsin 26

Summary of Argument—*Continued.*

Page

(b) Overlooks the fact that assumption of suicide would defeat recovery on two of the policies 27

(c) Decisions relied on by petitioners are, due to materially different factual situations, wholly inapplicable to the instant case 27

Conclusion 29

Table of Authorities Cited.

Cases:

A. & R. Realty Co. vs. Northwestern Mutual Life Ins. Co., 95 Fed. (2d) 703 19
American Oil Co. vs. Frederick, 47 F. (2d) 54 14

Barrett vs. Virginia Ry. Co., 250 U. S. 473 23
Barry vs. U. S., 54 S. Ct. 857, 292 U. S. 648, 78 L. Ed. 1498 17
Bouner vs. Texas Co., 105 F. (2d) 552 18
Bruins vs. Brandon Canning Co., 216 Wis. 387, 257 N. W. 35 7

Capital T. Co. vs. Hof, 174 U. S. 1, 43 L. Ed. 873, 19 Sup. Ct. 580 23
Claywell vs. Inter-Southern Life Ins. Co., 70 F. (2d) 569 19
Collier, F. P., & Son Co. vs. Hartfeil, 72 F. (2d) 625 19
Conn. General Life Ins. Co. vs. Allen, 64 F. (2d) 840 19
Cox vs. U. S., 96 F. (2d) 41 18
Creamery Package Mfg. Co. vs. Industrial Comm., 211 Wis. 326, 248 N. W. 140 8
Cross, Henry H., Co. vs. Simmons, 95 F. (2d) 482 19
Cupples Co., etc., vs. N. L. R. B., 106 F. (2d) 100 19
Cvelich vs. Erie R. Co., 199 A. 771, 120 N. J. L. 414 21

Authorities Cited—*Continued.*

	Page
Davie vs. Briggs, 97 U. S. 628	6
Deadrich vs. U. S., 74 F. (2d) 619	18
Delaney vs. Metropolitan Life Ins. Co., 216 Wis. 265, 257 N. W. 140	6, 15, 27
Dobelin vs. Maccabees, 171 Wis. 54, 174 N. W. 897	6, 12, 16
Draper vs. Louisville & N. R. Co., 156 S. W. (2d) 626 (Mo.)	22
DuPont, E. I. etc., Co. vs. Baridon, 73 F. (2d) 26	19
Eggen vs. U. S., 58 F. (2d) 616	18
Esser, Wm., & Co. vs. Industrial Comm., 191 Wis. 473, 477 N. W. 150	6
Employers Mut. Liability Ins. Co. vs. Brower, 224 Wis. 485, 272 N. W. 359	6, 12
Fehrer vs. Midland Casualty Co., 179 Wis. 431, 190 N. W. 910	27
Finkelstone vs. C. M. St. P. & P. R. Co., 94 Wis. 270, 68 N. W. 1005	23
Ft. Smith Gas Co. vs. Cloud, 75 F. (2d) 413	19
Griffin vs. Northwestern Mut. Life Ins. Co. (Mich.), 229 N. W. 509	28
Gunning vs. Cooley, 281 U. S. 90, 50 S. Ct. 231, 74 L. Ed. 720	21
Heron vs. Southern Pacific Co., 283 U. S. 91, 51 S. Ct. 383	23
Hills Dry Goods Co. vs. Industrial Comm., 217 Wis. 76, 258 N. W. 336	6, 11
Hoskins vs. U. S., 120 F. (2d) 464	19
Hotchkiss vs. Green Bay, etc., R. R. Co., 153 Wis. 340, 141 N. W. 231	9
Hyer vs. Janesville, 101 Wis. 371, 77 N. W. 729	10
Juchert vs. California Water Service Co., 97 P. (2d) 259	21
Kehoe vs. Commr., 105 F. (2d) 552	18
Kiley vs. C. M. St. P. & P. R. Co., 138 Wis. 215, 119 N. W. 309	23
Lansing vs. John Strange Paper Co., 227 Wis. 439, 278 N. W. 857	10

Authorities Cited—*Continued.*

	Page
Liggett & Myers Tob. Co. vs. DeParcq, 66 F. (2d) 678	18
Malinowski vs. Moss, 196 Wis. 292, 220 N. W. 197	23
Marcott vs. Minneapolis, etc. Ry. Co., 147 Wis. 216, 133 N. W. 37	7
Marvin, et al, vs. C. M. St. P. & P. R. Co., 79 Wis. 140, 47 N. W. 1123	8
May Department Stores Co. vs. Bell, 61 F. (2d) 830	19
McDonald vs. Provident Savings Life Assurance Society, 108 Wis. 213, 84 N. W. 154	11
Megow vs. C. M. St. P. & P. R. Co., 86 Wis. 466, 56 N. W. 1099	8
Menasha Woodenware Co. vs. Industrial Comm., 187 Wis. 21, 203 N. W. 906	27
Musbach vs. Wisconsin Chair Co., 108 Wis. 57, 84 N. W. 36	9
Mutual Life Ins. Co. vs. Zimmerman, 75 F. (2d) 758	18, 19
National Life Assn. vs. Driskill, 138 S. W. (2d) 238 (Tex. Civ. App.)	21
New York Life Ins. Co. vs. King, 93 F. (2d) 347	18
Penn. R. Co. vs. Chamberlain, 288 U. S. 333, 53 S. Ct. 391, 77 L. Ed. 819	21
Reichert vs. Rex Accessories Co., 228 Wis. 425, 279 N. W. 645	11
Ruhlin vs. New York Life Ins. Co., 304 U. S. 202	20
Showalter vs. Western P. R. Co., 106 P. (2d) (Cal.)	21
Simmons vs. Industrial Comm., 211 Wis. 445, 248 N. W. 443	27
Southern Ry. Co. vs. Stewart, 119 F. (2d) 85	18
Spachman vs. Benefit Assn., 89 P. (2d) 490 (Utah)	21
Stevens vs. The Whiite City, 285 U. S. 195, 52 S. Ct. 347, 76 L. Ed. 699	21
Strider vs. Penn. R. Co., 60 F. (2d) 237	14
Svenson vs. Mutual Life Ins. Co., 87 F. (2d) 441	19
Texarkana Bus Co. vs. N. L. R. B., 119 (2d) 480	18
Thoe vs. C. M. St. P. & P. R. Co., 181 Wis. 456, 195 N. W. 407	23

Authorities Cited—*Continued.*

	Page
Thomas vs. Steppert, 200 Wis. 388, 228 N. W. 513	9
U. S. vs. Barry, et al, 67 F. (2d) 763	17
Vilter Mfg. Co. vs. Industrial Comm., 192 Wis. 362, 212 N. W. 641	7
Walraven vs. Sprague, Warner & Co., 235 Wis. 259, 292 N. W. 883	10
White vs. Brotherhood of Locomotive Firemen, 165 Wis. 418, 162 N. W. 441	6, 15
Whiteley vs. Equitable Life Assurance Society, 72 Wis. 170, 39 N. W. 369	5, 15, 27
Wiederin vs. C. & N. W. Ry., 212 Ia. 1103, 237 N. W. 344	22
Wiger vs. Mutual Life Ins. Co., 205 Wis. 95, 236 N. W. 534	27
Wilson vs. Borden, 62 F. (2d) 866	18
Woodward Iron Co. vs. Goolsby, 6 So. (2d) 11 (Ala.)	22
Wright vs. Dubbelde, 42 S. D. 12, 172 N. W. 500	22
Zuwodnicek vs. Higgins Spring & Axle Co., 151 Wis. 118, 138 N. W. 48	7

Statutes:

28 U. S. C. A., Sec. 347	2

In the Supreme Court of the United States

October Term, 1941 - Nos. 1209 and 1210

Gladys M. Westphal, widow of F. Gilbert Westphal, Shirley June Westphal, Janice Beth Westphal, and Ellen Mae Westphal, minors, children of Gladys M. Westphal and F. Gilbert Westphal, by Gladys M. Westphal, their guardian ad litem,

Petitioners,

vs.

Kansas City Life Insurance Company, Kansas City Missouri, a corporation,

Respondent.

Gladys M. Westphal, widow of F. Gilbert Westphal,

Petitioner,

vs.

Kansas City Life Insurance Company, Kansas City Missouri, a corporation,

Respondent.

Brief in Opposition to Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

To the Honorable, the Chief Justice and the Associate Justices of the Supeme Court of the United States:

Respondent, Kansas City Life Insurance Company, answering the petition for writs of certiorari on file herein, respectfully represents as follows:

Opinions Below.

The opinion of the Circuit Court of Appeals for the Seventh Circuit (R. 279-284) was written by Circuit Judge Kerner; dissent by Circuit Judge Evans (R. 284-287); reported in 126 F. (2d) 76. The opinion of District Judge Duffy (R. 229-240) is reported at 37 F. Sup. 300.

Jurisdiction.

Jurisdiction is invoked under Section 240 (a) of the Judicial Code (28 U. S. C. A., Sec. 347).

Opinion and judgment of the Circuit Court of Appeals were filed February 5, 1942 (R. 287). Petition for rehearing was filed February 19, 1942 (R. 288), and denied February 26, 1942 (R. 289). Petition for certiorari was filed in this Court May 4, 1941, and service of notice thereof with printed copy of record and brief of petitioners was made on respondent May 14, 1941. The jurisdiction of the District Court depended on diversity of citizenship.

Petitioners seek to review decision of the Circuit Court of Appeals which granted respondent's motions for direction of verdict and judgment n.v.o., reversing the District Court.

Statement of Case.

In view of petitioners' failure to have made anything in the nature of a fair statement of the case, a statement by the respondent seems necessary:

The controlling facts, accepted as clearly established by both Courts below, and set out at some length in the District Court's opinion (R. 229-239), and more concisely in the opinion of the Circuit Court of Appeals (R. 279-284) are: F. Gilbert Westphal, aged 33, living with his wife and three young children in a Milwaukee suburb, of good family connections and *reputed* to be of excellent character

(R. 84-98, 100-105, 107-109, 112-115) and *reputed* to be domestically happy (R. 84-98, 107-109, 112-115), was, in fact, involved in some domestic difficulties (see his wife's letter, R. 185) and was a studied embezzler (R. 230-231, 232-233, 280-282). For nearly a year he had been embezzling money from his employer and falsifying the records (R. 231, 122-125, 143-150, 154-159, 280), and detection was imminent (R. 231, 233, 280-281). Thereupon, he fled, having been last seen November 5, 1931 at 7:30 P. M. when he brought his automobile into a public garage 1 1/2 blocks from his apartment and left the garage with a valise in his hand (R. 152-153, 282, 230).

He left two letters, one to his wife (R. 232, 281), and one to his employer (R. 232-233, 282), in which he admitted his peculations and declared, in the letter to his wife, "* * * I am gone, *not to return until* I prove before myself & God that I am worthy of you & our three beautiful daughters." (R. 281) (italics ours) and in the letter to his employer:

> "I myself am going to try to get to some town in which I can get an absolutely new start and try to make good—or I will pass out in the attempt.
>
> "There seems to be no other way out and I feel that I cannot look you in the eye again until my self respect and my innermost self tells me that I can come to you with clean hands and in a position to pay all that I am in arrears."
>
> (R. 282)

He had felt ill and taken some soda the night before he left (R. 36-37), but on the morning of his departure he told his wife that he felt "all right" (R. 37-38).

The amount of money that he had embezzled exceeded $1,500.00 (R. 230). His wife could not account for (R. 30-31, 55) and the evidence did not otherwise disclose any disposition of the embezzled moneys and certain portions

of his earnings (R. 91, 113). In addition, two weeks before he fled, he had borrowed $400.00 on his note at a bank, which he left unpaid (R. 160, 231, 281), and at some time before he fled he had put a $250.00 chattel mortgage on his automobile (R. 231); and his accounts at two banks were overdrawn (R. 174, 185, 281); and on the very day that he left he obtained $450.00 cash at a local bank on a check which was subsequently dishonored for lack of funds (R. 141-142, 231, 281). No report of his disappearance to any public authorities nor request to locate him was made by his wife or relatives (R. 111, 138-139). No unidentified male body was found in Milwaukee County for a number of months after his disappearance (R. 137).

Twenty months after his disappearance, his wife instituted suit and obtained a judgment of divorce from him on the ground that he had deserted her (R. 55). Seven years passed without tydings of or from him. No premiums being paid after he left, his life insurance policies lapsed, one 21 days, one 5 months and 25 days and one 6 months and 23 days after his departure. Two of the policies had been issued less than one year (R. 7, 8) and one had been in force slightly over one year (R. 4)when he disappeared. All of the policies provided against recovery in case death was by suicide within one year from issuance of policy.

On this state of the evidence, the respondent moved for a direction of verdict (R. 229), on the ground of insufficiency of evidence to sustain a verdict for the plaintiff, on which the Trial Court reserved decision under rule 50 (b) (R. 229), and submitted the case to the jury, which found that the insured had died within twenty-one days of the date he fled (R. 226, 279). Respondent moved for judgment n.v.o. on the same ground (R. 228-229-230). The Trial Judge in his opinion expressed "considerable concern" as to whether the evidence presented a jury issue and declared that, if it were proper for him to pass on the

evidence, he would "without hesitation" have found no death within the lapse periods, as the letter from the insured to his employer "* * * would have been decisive in my mind " (R. 233). But the Trial Court thought that under the Wisconsin decisions "the time of death" was for determination by the jury (R. 238). The Circuit Court of Appeals, after careful analysis of the Wisconsin decisions, concluded the contrary (R. 279-284). The dissenting opinion in the Circuit Court of Appeals, while purporting to apply the Wisconsin decisions, cited and apparently relied on decisions from a number of other states (R. 285-286). The claim of petitioners was that Westphal "* * * met his death at or about November 5, 1931, when he was last seen" (R. 5, 7, 9).

ARGUMENT.

I.

In Wisconsin, the presumption from seven years' absence has no evidentiary effect whatever toward proving that the person was dead or alive at any particular time in the seven-year period — that must be established by other affirmative proofs.

In Wisconsin, the presumption of death from absence for 7 years without tydings is evidentiary that the absent one is dead *at the expiration of the 7-year period.* That presumption has no evidentiary effect whatever as to whether the absent one was dead or alive at any particular time *during the 7-year period.*

Whiteley vs. Equitable Life Assurance Soc., 72 Wis. 170, 39 N. W. 369;

White vs. Brotherhood of L. F., 165 Wis. 418, 162 N. W. 441;
Delaney vs. Metropolitan L. Ins. Co., 216 Wis. 265, 257 N. W. 140;
Davie vs. Briggs, 97 U. S. 628.

The burden is on the party so claiming to establish, by other affirmative evidence, death at some particular time within the 7-year-period, *the presumption being of no assistance in that respect.*

Whiteley vs. Equitable (supra);
White vs. Brotherhood (supra);
Delaney vs. Metropolitan (supra);
Dobelin vs. Maccabees, 171 Wis. 54, 174 N. W. 897.

II

In Wisconsin an inference from circumstantial evidence must be a rational and logical deduction from established facts; and it cannot be one of several inferences which might, with equal propriety, be drawn from the same facts.

"But an inference must be drawn from established facts which logically support the same."

Wm. Esser & Co. vs. Industrial Commission, 191 Wis. 473, 477, 211 N. W. 150.

"The inference must not only be rational, but it must be a logical deduction from the established facts and not one of several inferences which might with equal propriety be drawn from the same facts."

Hill Dry Goods Co. vs. Industrial Commission, 217 Wis. 84, 258 N. W. 336, 339.

Quoted with approval in *Employers Mutual Liability Co. vs. Brower*, 224 Wis. 485, 272 N. W. 359.

III.

To warrant or sustain a jury's verdict, the evidence must establish the requisite facts to a *reasonable certainty*.

"Verdicts * * * must be bottomed at least upon a reasonably certainty."

Marcott vs. Minneapolis, etc. Ry. Co., 147 Wis. 216, 223-224, 133 N. W. 37.

"To warrant a recovery the cause of the injury must be established to a reasonable certainty." (citing cases)

Zuwodnicek vs. Higgins Spring & Axle Co., 151 Wis. 118, 120, 138 N. W. 48.

"That a finding or verdict must amount to a reasonable certainty is the law."

Vilter Mfg. Co. vs. Industrial Commission, 192 Wis. 362, 365, 212 N. W. 641.

IV.

When proof to reasonable certainty depends upon probabilities from circumstantial evidence, the probabilities must preponderate so strongly as to establish the particular fact to a reasonable certainty.

"Having in mind that a verdict may be sustained upon a preponderance of probabilities to a reasonable degree of certainty, that means no more than that probabilities must preponderate so strongly that the fact sought to be proven is established to a reasonable certainty."

Bruins vs. Brandon Canning Co., 216 Wis. 387, 402, 257 N. W. 35.

"Preponderance of mere possibilities is, of course, not the equivalent of a preponderance of probabilities. Mere possibilities leave the solution of an issue of fact in the field of conjecture and speculation to such an extent as to afford no basis for inferences to a reasonable certainty, and in the absence of at least such inferences there is no sufficient basis for a finding of fact."

Creamery Package Mfg. Co. vs. Industrial Commission, 211 Wis. 326, 248 N. W. 140.

V.

Where circumstantial evidence is relied on, and the circumstances indicate that either of two things might have occurred, one event being actionable and the other not, no jury issue is made.

In a suit for proof of damage from a fire, the evidence disclosed that there were two fires, either of which might possibly have spread and caused the damage, and the defendant was responsible for one fire but not for the other; it was held that the evidence did not present a jury issue.

Marvin, et al, vs. C. M. St. P. & P. Ry. Co., 79 Wis. 140, 47 N. W. 1123;

Megow vs. C. M. St. P. & P. Ry. Co., 86 Wis. 466, 56 N. W. 1099.

VI.

In such a situation, if the evidence leaves the inference of the occurrence of one event as permissible or as probable as the other, the evidence cannot sustain a verdict for the party having the burden of proof.

"With these two possible causes to account for the explosion, the burden of proof, of course, rested on

> the plaintiff to prove the one for which defendant would be liable. It did not suffice that one might be as probable as the other. It was not the situation of two possible causes, one or the other of which the jury must adopt, * * *".

Held no jury question.

Musbach vs. Wisconsin Chair Co., 108 Wis. 57, 67-68, 84 N. W. 36.

Of course, we do not here deal with a situation of two possible events, one or the other of which *must* be adopted from the evidence.

Where a boy six years old was killed by a locomotive on a railroad train and the circumstances disclosed that he might have gotten on the track through a hole in a gate resulting from a broken board or by having crawled through the fence at some other point, it was held that there was no more probability that he entered at the break in the gate than through any other point in the fence, and a verdict so holding must be reversed as based on conjecture.

Hotchkiss vs. Green Bay, etc., R. R. Co., 153 Wis. 340, 345, 141 N. W. 231.

Where it was permissible on the evidence to infer that the accident came from an actionable cause or a non-actionable cause, the Court said:

> "Even though one inference is as permissible as another, the jury could do no more than to guess at the cause of the accident, and mere conjecture will not sustain verdicts."

Thomas vs. Steppert, 200 Wis. 388, 393-4, 228 N. W. 513.

VII.

Where, as here, circumstantial evidence alone is relied upon, and the *established facts* permit, with equal consistency or propriety, differing inferences to be drawn, the choice rests on conjecture and the party with the burden of proof has not made a jury issue.

(a) This principle has obtained in Wisconsin from an early day down to the present time. It has been stated in varying language, but to the same end. In the old case of *Hyer vs. Janesville,* 101 Wis. at 377, 77 N. W. at 731, the Wisconsin Supreme Court declared:

> "In a case like this it is incumbent upon the plaintiff to show by evidence, with reasonable distinctness, how and why the accident occurred. Morrison vs. Phillips & C. Const. Co., supra. **To present two or more states of a case upon which a jury may theorize as to the real cause of the accident, putting one conjecture against another and determining which is the more reasonable, comes far short of making a case.**" (Bold type supplied)

This early doctrine as stated in the *Hyer* case was cited and quoted with approval as late as 1940 in—

Walraven vs. Sprague, Warner & Co., 235 Wis. at 266, 292 N. W. at 885.

The *Hyer* case was also quoted and cited with approval in 1938 in

Lansing vs. John Strange Paper Co., 227 Wis. at 443, 278 N. W. at 858.

And in the same year the Wisconsin Supreme Court again cited and quoted the *Hyer* case with approval, re-affirming in—

Reichert vs. Rex Accessories Co., 228 Wis. at 440, 279 N. W. at 6,

by specific quotation the following doctrine:

> "To present two or more states of a case upon which a jury may theorize as to the real cause of the accident, putting one conjecture against another and determining which is the more reasonable, comes far short of making a case."

In the case of—

McDonald vs. Provident Savings Life Assurance Society, 108 Wis. at 219, 84 N. W. at 156,

the Wisconsin Supreme Court explained the rule, as follows:

> "The burden of proof to establish the claim that the note was received as a payment of the premium was on plaintiff, and, while an express contract may be established in whole or in part by circumstantial evidence (*Leitgabel vs. Belt,* ante, p. 107), mere circumstances **that point one way as reasonably and significantly as the other** are insufficient for that purpose. In such a situation the controversy should not be submitted to the jury. It involves a question calling for the exercise of the judicial function to declare the right as a matter of law. But if the question is submitted to a jury and they be permitted to guess or conjecture as to where the truth lies, if the result is contrary to the legal conclusion which the court should declare, it ought not to be allowed to stand as a correct determination of the rights of the parties. *Hyer vs. Janesville,* 101 Wis. 371; *Cawley vs. La Crosse City R. Co.,* 101 Wis. 145. (Bold type supplied)

In 1935 the Wisconsin Supreme Court without reference to the early cases again voiced its approval of this rule when it stated in *Hills Dry Goods Co. vs. Industrial Comm.,* 217 Wis. at 84, 258 N. W. at 339, per Rosenberry, C. J.:

> "In this case there is no direct testimony that the claimant fell into the elevator shaft while operating, or attempting to operate, or even getting ready to operate, the elevator. Do the facts adduced upon the hearing permit of an inference that he was operating the elevator? In this connection an inference is to be clearly distinguished from a mere guess or conjecture. As was said in Creamery Package Mfg. Co., supra, 'inferences * * * must be drawn from established facts which logically support them.' In other words, they must be rational. The inference must not only be rational, but it must be a logical deduction from the established facts **and not one of several inferences which might with equal propriety be drawn from the same facts.**" (Bold type supplied)

And in 1937 the Court in—

> *Employers Mut. Liability Ins. Co. vs. Brower,* 224 Wis. at 490, 272 N. W. at 361,

used with approval the following language taken from the *Hills Dry Goods Co.* case:

> "The inference must not only be **rational,** but it must be a logical deduction from the established facts **and not one of several inferences which might with equal propriety be drawn from the same facts.**" (Bold type supplied)

Exactly that test of sufficiency of the evidence was applied by the Wisconsin Court in—

> *Dobelin vs. Maccabees,* 171 Wis. 54, 174 N. W. 897,

a disappearance case where the issue was whether the man had died within four years and nine months after disappearance, and the finding depended on inferences to be drawn from purely circumstantial evidence. The Court said that failure to communicate by failing to fulfill the promise to repay an advance of money within fifteen days was—

> "* * * fully as consistent with the theory of continued life, coupled with disability or disinclination to repay, as with an inference that such obligation of repayment had been abrogated by speedy death". (171 Wis. at 58)

Thus, equally consistent inferences being deducible from the circumstances, one pointing to continued life and the other to death, at the time in question, the plaintiff "* * * did not meet the burden of proof * * *" and the judgment was reversed.

That, precisely, was the basis of the determination by the Circuit Court of Appeals, using the very language of the *Dobelin* case (R. 284).

VIII.

The state of the evidence in this case required the application of that principle.

(a) Petitioners' proof tended to establish Westphal as a man of good repute with affection for his wife and children, whose disappearance, *unaccounted for,* might warrant inference of death *at that time.*

(b) But respondent's uncontradicted proof disclosed him to be an embezzler who fled when detection was imminent, who prepared for flight by gathering in substantial cash funds topped by $450.00 drawn on an invalid check the very day he departed, and who left solemn written declarations that he was going to try a new start in some other place and would not return until able to repay his defalcations.

(c) It was not a question of disputed proofs or contradictory evidence, nor of choice between permissible inferences from particular evidence or from contradictory evidence; nor was it a question of giving petitioners' evidence the most favorable view.

(d) It was simply that to the circumstances adduced by petitioners there had been added by uncontradicted proofs additional circumstances showing the cause of the disappearance, and showing a plan and an avowed purpose of concealment for a considerable period of time.

(e) Taking into consideration all the established facts, it could be inferred with greater or with equal consistency that life had continued for some extended period of time than that he suffered death speedily after his flight. In that situation, Wisconsin law clearly required a direction of verdict for respondent. The Circuit Court of Appeals so concluded (R. 284).

It is elementary that circumstantial evidence which, standing alone, may be considered of "substantial character" for the purpose of drawing inferences, can lose that "substantial character" when additional evidence is offered which discloses further circumstances.

American Oil Co. vs. Frederick, 47 F. (2d) 54, 56 (6th C. C. A.);

Strider vs. Penn. R. Co., 60 F. (2d) 237, 239 (6th C. C. A.).

IX.

Petitioners' statement of "Reasons Relied on for the Allowance of the Writs" assigns reasons not appropriate to the issue involved.

(a) There does not exist the asserted failure to have applied the state law.

We have indicated above the settled law of Wisconsin in respect of the degree of proof required to permit of a jury verdict when circumstantial evidence alone is relied on. It is to be borne in mind here that Wisconsin decisions cited in the petitioners' brief dealing with the scope per-

missible to a jury in drawing inferences are cases which deal with either disputed testimony or conflicting evidence, direct or circumstantial, or choice of inferences permissible from a particular fact, or the adoption of one of two alternatives, when from the evidence one or the other must be adopted. The cases that we have cited above are the ones which deal specifically with the type of issue which was presented in the instant case, i.e. the matter of inferences permissible to be drawn from undisputed circumstantial evidence alone, standing as established facts.

It is the settled law of Wisconsin that the presumption from seven years' absence without tydings has no evidentiary effect whatsoever on the issue of whether the absent person was dead or alive at any particular time within the seven-year period.

Whiteley vs. Equitable Life Assurance Society, 72 Wis. 170, 39 N. W. 369;

White vs. Brotherhood of Locomotive Firemen, 165 Wis. 418, 162 N. W. 441;

Delaney vs. Metropolitan Life Ins. Co., 216 Wis. 265, 257 N. W. 140.

In attempting to prove death at some particular time within the seven-year period, a showing of disappearance with no known cause, reason, or explanation, naturally permits inference of death at time of disappearance.

White vs. Brotherhood of Locomotive Firemen, 165 Wis. 418, 162 N. W. 441;

Delaney vs. Metropolitan Life Ins. Co., 216 Wis. 265, 257 N. W. 140.

But where, either on account of the looseness of home ties or a showing of motives that prompted disappearance and concealment, the disappearance does not bear the inference of death at that time, then there is no basis in the

evidence which permits a finding of death fresh on the disappearance. The Wisconsin Supreme Court applied exactly that test in the case of *Doeblin vs. Maccabees,* 171 Wis. 54, 174 N. W. 897, in which the Court applied the well established principle outlined at heading II of this brief, and held that in such situations, giving due effect to all of the established facts, an inference of "continued life" was as consistent as an inference of speedy death. This was the principle which the Circuit Court of Appeals applied in the instant case (R. 284). It recognized that if a man with strong home ties were to disappear with no known cause or reason therefor, an inference of death at or about the date of disappearance was permissible; but it held that where, as here, the undisputed evidence disclosed the man to have been an embezzler whose detection was imminent, and who had gathered in a considerable sum of cash to facilitate his flight, and who had left letters solemnly declaring that he would not return until he had tried to make good in some other place and could repay his peculations—in short, an avowed plan of concealment and non-communication for some considerable period of time—those undisputed facts could not be disregarded, and, taking into consideration all of the established facts, an inference of continued life for some considerable period of time was as consistent or appropriate as an inference of death at the time of departure; and as pointed out in earlier parts of this brief, the Wisconsin Supreme Court has repeatedly held that such a state of evidence presents no jury issue, but presents only choice between conjectures, not permissible under Wisconsin law.

(b) There does not exist the asserted conflict in decisions between different circuits.

We do not understand just what petitioners mean by the assertion that one of the reasons for the allowance of the writs is conflict between the decisions of different cir-

cuits. We find nothing in petitioners' brief to support that contention.

As indicated above, the Circuit Court of Appeals applied the required Wisconsin law on the undisputed facts by ruling that it was just as consistent to infer that Westphal had carried out his avowed purpose of concealment, non-communication, and an attempt to earn enough to pay his defalcations, and continued on that course for years, as it was to infer that he died fresh on his departure and before having opportunity to have attempted to put his avowed plan into effect. In ordinary reason and common sense, it would seem much more probable to infer that he did attempt his avowed purpose and was in the course of it for such period of time as the carrying out of such a purpose would normally have required, or that after making the attempt to carry out his avowed purpose he failed, and, consistently with his own declarations, for that reason never returned or communicated. It was not necessary, however, that the greater probability lie in that direction so far as the respondent's case is concerned. It was entirely sufficient, as the Circuit Court of Appeals held, that the inferred continuance of life for some period of time was at least as consistent on the established facts as any theory that he died fresh on his departure.

The same rule applied in Wisconsin, though worded somewhat differently, is applied generally in the various Federal Circuits:

> "* * * when proven facts support equally two inconsistent inferences, there is no substantial evidence to support either, and judgment must go against the party having the burden."
>
> *United States vs. Barry, et al,* 67 F. (2d) 763, 765 (C. C. A. 6th) (Certiorari denied *Barry vs. United States,* 54 S. Ct. 857, 292 U. S. 648, 78 L. Ed. 1498).

"If the testimony leads as reasonably to one hypothesis as to another, it tends to establish neither."

Deadrich vs. U. S., 74 F. (2d) 619, 622—9th C. C. A.

Evidence consistent with an hypothesis of negligence, and also with one of no negligence, tends to establish neither.

Wilson vs. Borden, 62 F. (2d) 866, 868 (C. A. of D. C.).

"* * * where proven facts give equal support to each of two inconsistent inferences, judgment must go against the party upon whom rests the burden of sustaining one of these inferences as against the other."

Liggett & Myers Tobacco Co. vs. DeParcq, 66 F. (2d) 678, 684 (8th C. C. A.).

"The case falls within the well settled rule that evidence which is equally consistent with two hypotheses, under one of which a defendant is liable, and under the other of which it is not liable, supports neither hypothesis."

New York Life Ins. Co. vs. King, 93 F. (2d) 347, 353 (8th C. C. A.);

Mutual Life Ins. Co. vs. Zimmerman, 75 F. (2d) 758, 762 (5th C. C. A.);

Kehoe vs. Comm., 105 F. (2d) 552, 555 (3rd C. C. A.).

To the same effect:

Texarkana Bus Co. vs. N. L. R. B., 119 F. (2d) 480, 486;

Bouner vs. Texas Co., 105 F. (2d) 552, 555;

Southern Ry. Co. vs. Stewart, 119 F. (2d) 85, 89;

Eggen vs. U. S., 58 F. (2d) 616, 620;

Cox vs. U. S., 96 F. (2d) 41, 43;

Hoskins vs. U. S., 120 F. (2d) 464, 466;
Cupples Co., etc., vs. N. L. R. B., 106 F. (2d) 100, 114;
A. & R. Realty Co. vs. Northwestern Mutual Life Ins. Co., 95 F. (2d) 703, 709;
Svenson vs. Mutual Life Ins. Co., 87 F. (2d) 441, 443;
Henry H. Cross Co. vs. Simmons, 96 F. (2d) 482, 486;
E. I. DuPont, etc., Co. vs. Baridon, 73 F. (2d) 26, 31;
P. F. Collier & Son Co. vs. Hartfeil, 72 F. (2d) 625, 630;
Conn. General Life Ins. Co. vs. Allen, 64 F. (2d) 840, 843;
May Department Stores Co. vs. Bell, 61 F. (2d) 830, 842;
Ft. Smith Gas Co. vs. Cloud, 75 F. (2d) 413, 416.

The cases of—

Mutual Life Ins. Co. vs. Zimmerman (supra), and
Claywell vs. Inter-Southern Life Ins. Co., 70 F. (2d) 569,

illustrate the application of this rule to disappearance cases. In both of those cases, it was held that no jury issue was presented, although in both cases the facts were so much stronger in favor of the plaintiff than are the facts in the present case as to leave the cases on no comparable basis. In the *Claywell* case, the Court remarked:

> "*Undisputed* evidence which, taken as a whole, leaves one uncertain as to whether insured voluntarily disappeared or not lacks that degree of probability required * * *".

It may also be noted as pointed out by this Court in *Ruhlin vs. New York Life Ins. Co.*, 304 U. S. 202, since *Erie Railroad vs. Tompkins* a question of this kind is to be determined by the state law, and as to questions controlled by state law, conflict among circuits is not of itself a reason for granting a writ of certiorari.

(c) There does not exist the asserted conflict between decisions of the same circuit, and if there did that likewise would be without significance, as the applicable law is the state law.

We find nothing in petitioners' brief to indicate that the Circuit Court of Appeals' decision in the instant case is in conflict with any other decision or decisions of the same Circuit Court of Appeals. It would indeed be strange if other decisions of the 7th Circuit were in conflict with so settled a principle of law as that on which the decision in the instant case is grounded. Even if that were true, it would seem to be wholly without significance, in view of the fact, as pointed out above, that the applicable law is the state law.

(d) There does not exist the asserted conflict with decisions of this court.

We find no cases in the petitioners' brief in which this Court has passed upon the Wisconsin principle which deals with instances of circumstantial proof in which, considering all of the established facts, inferences for and inferences against a party's claim may be drawn with equal consistency or appropriateness. So we see no basis for petitioners' assertion that the decision of the Circuit Court of Appeals in the instant case is in conflict with the decisions of this Court. On the contrary, the decisions of this Court recognize and apply substantially the same principle recognized and applied in Wisconsin.

> "The evidence is consistent with an hypothesis that the tug was not negligent and with one that it was, and therefore has no tendency to establish either."

Stevens vs. The White City, 285 U. S. 195, 52 S. Ct. 347, 350, 76 L. Ed. 699.

"When a plaintiff produces evidence that is consistent with an hypothesis that the defendant is not negligent, and also with one that he is, his proof tends to establish neither."

Gunning vs. Cooley, 281 U. S. 90, 50 S. Ct. 231, 233, 74 L. Ed. 720.

"* * * where proven facts give equal support to each of two inconsistent inferences * * * judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other, before he is entitled to recover. * * * There being several inferences deducible from the facts which appear, and equally consistent with all those facts, the plaintiff has not maintained the proposition upon which alone he would be entitled to recover."

Penn. R. Co. vs. Chamberlain, 288 U. S. 333, 53 S. Ct. 391, 393, 77 L. Ed. 819.

The same principle is applied generally in the State Courts:

Crelich vs. Erie R. Co., 199 A. 771, 120 N. J. L. 414;

Spackman vs. Benefit Assn., 89 P. (2d) 490 (Utah);

Juchert vs. California Water Service Co., 97 P. (2d) 259;

National Life Assn. vs. Driskill, 138 S. W. (2d) 238 (Tex. Civ. App.);

Showalter vs. Western P. R. Co., 106 P. (2d) (Cal.);

Woodward Iron Co. vs. Goolsby, 6 So. (2d) 11 (Ala.);
Draper vs. Louisville & N. R. Co., 156 S. W. (2d) 626 (Mo.);
Wiederin vs. C. & N. W. Ry., 212 Ia. 1103, 237 N. W. 344;
Wright vs. Dubbelde, 42 S. D. 12, 172 N. W. 500.

(e) There does not exist the asserted violation of the Seventh Amendment, except consequentially as it may be said to exist in every instance in which a motion to direct a verdict is granted.

There is no federal statute in question, and neither the Seventh Amendment nor any other provision of the United States Constitution is drawn directly in question. If the petitioners' assertion of violation of the Seventh Amendment as a basis for review is well taken, then it would seem that every ruling on a motion for direction of verdict or motion for judgment n.v.o. draws the Seventh Amendment directly in question, and that every instance in which a Trial Court grants such a motion presents an appropriate ground for the defeated party to apply to this Court for certiorari. If certiorari is appropriate to cause a review of the quantum of evidence in every instance of direction of verdict or granting of motions n.v.o., the burden to be cast on this Court promises to be tremendous.

On the basis of the authorities cited in this brief, the ruling was a required ruling in conformity with established principles of Wisconsin law, and the decisions of this Court and of Federal Courts generally.

(f) **The repeated assertion in petitioners' brief that the decision of the Circuit Court of Appeals was a usurpation of the functions, and denied the petitioners jury trial according to the course of the common law, is unfounded. "Trial by jury" according to the course of the common law embodied, as an essential element, the right of the judge, upon a proper factual situation, to direct a verdict or to set aside a verdict returned by the jury.**

Capital T. Co. vs. Hof, 174 U. S. 1, 43 L. Ed. 873, 877, 19 Sup. Ct. 580;
Barrett vs. Virginian Ry. Co., 250 U. S. 473, 476;
Heron vs. Southern Pacific Co., 283 U. S. 91, 51 S. Ct. 383.

That principle has always been recognized in Wisconsin.

Malinowski vs. Moss, 196 Wis. 292, 220 N. W. 197;
Thoe vs. C. M. St. P. & P. R. R. Co., 181 Wis. 456, 195 N. W. 407;
Kiley vs. C. M. St. P. & P. R. R. Co, 138 Wis. 215, 119 N. W. 309, 120 N. W. 756;
Finkelstone vs. C. M. St. P. & P. R. R. Co., 94 Wis. 270, 68 N. W. 1005.

X.

Petitioners' Brief misstates some of the most important points of evidence: It presents an extremely partisan viewpoint, with no effort to present the facts fairly.

(a) Petitioners' brief, page 19, undertakes to deny the proof of embezzlement, and states that no one could tell if the account "• • • showed a balance one way or the other", and indicates that it was open to dispute or different inferences, that the amount proved embezzled was not at all clear and "is open to reduction". These are misstate-

ments of the evidence. Embezzlement was established by absolute and undisputed proofs (R. 119-136). The Trial Court so found in its opinion on the motions (R. 230, 231), and again so found in special findings on another issue (R. 246). The Circuit Court of Appeals so found (R. 280, 281).

(b) On page 20, petitioners' brief asserts that a system of collecting and accounting for premiums was maintained in the branch office "contrary to policy requirements", and "was not satisfactorily explained". This is a direct misstatement of the undisputed evidence (R. 119-136, 130, 190). The Circuit Court of Appeals stated the facts in this respect exactly as established (R. 280).

(c) On the vital point of when and where he was last seen, petitioners' brief, page 24, misstates the testimony by asserting that it is disputed that Westphal was last seen about 7:30 P. M. on November 5, 1931, leaving the garage with his valise in his hand. That fact was proved by an eye witness, the garage attendant, who was well acquainted with Westphal (R. 152-3). No witness testified to the contrary. Petitioners attempted to get in some hearsay statements from Mrs. Westphal as to what she was told by other persons (R. 50, 51), but these, on objection, were stricken out (R. 51). Both the opinion of the Trial Court (R. 230) and the opinion of the Circuit Court of Appeals (R. 282) have found it as an undisputed fact that Westphal was last seen at the time in question leaving the garage, with his valise in his hand.

(d) A reading of the opinion of the District Court (R. 229-239) and of the Circuit Court of Appeals (R. 279-284) will disclose the controlling facts to be as we have summarized them in this brief. That state of facts, however, cannot be found in the petition and brief of the petitioners. It would be quite proper for the petitioners to present and argue only their own proofs and the most favorable infer-

ences to be drawn from those proofs if we were dealing with a question of disputed testimony or evidence as to a particular fact, or disputed inferences susceptible of being drawn from a particular item of evidence, or of giving to the petitioners' evidence the most favorable point of view. In determining whether a jury issue is presented, a party may, of course, rely upon the version most favorable to him in respect of disputed or contradictory testimony, or the inference most favorable to him permissible to be drawn from a particular item of evidence. But here none of those problems is presented. The problem here is that of giving effect, according to the Wisconsin law, to all uncontroverted facts clearly established by the evidence. The petitioners disregard that, however, and, instead of assembling and dealing with all of the uncontroverted facts, ignore or misstate important uncontroverted facts established by respondent's proof, while devoting great space in the brief to stressing their own evidence.

(e) On pages 22-23 petitioners' brief undertakes to cast doubt on the authenticity of the letters left by Westphal. The signatures of both letters were proved without dispute to be his signatures (R. 179, 139). Both Courts below recognized the evidence as establishing without dispute the authenticity of those letters (R. 232-233, 281-282).

(f) The extent to which petitioners' brief goes in unfairly reflecting the facts may be judged by the passages at page 24 which explain that Westphal's contracting a social disease was the fault of respondent, not the fault of Westphal!

XI.

The Petition and Brief do not comply with the rules of this court.

(a) The statement of the matter involved is not "summary and short", but is prolix, partisan, and argumentative. This is evident from a mere reading of the petition. It has made it a rather difficult problem for the respondent to meet without having too lengthy a brief. A "summary and short" statement could have been made which would have clearly disclosed the issue involved.

(b) The brief is not "direct and concise", but is circuitous, long drawn out, and burdened with merely cumulative quotations and reiteration.

(c) The violation of the rules of this Court in those respects is carried to such an extent as to obscure rather than reveal the real question sought to be reviewed. Had the rules been complied with by petitioners' counsel, it would have avoided the necessity of respondent's making a statement of facts and would have, in respects, simplified the presentation of respondent's objections.

XII.

Suggestion of suicide answered.

(a) The dissenting opinion in the Circuit Court of Appeals seems to be based on the thought that the tenor of the letters was such as to warrant an inference of suicide inferentially connected with the time of departure. Such a thought was not entertained before the Trial Court, nor discussed in the briefs submitted to the Circuit Court of Appeals, so Judge Evans had not the benefit of a presentation on that question. Such a presentation would have

directed to his attention the extremely strong presumption against suicide which obtains in Wisconsin.

Fehrer vs. Midland Casualty Co., 179 Wis. 431, 434, 190 N. W. 910;

Menasha Woodenware Co. vs. Industrial Comm., 187 Wis. 21, 203 N. W. 906;

Wiger vs. Mutual Life Ins. Co., 205 Wis. 95, 236 N. W. 534;

Simmons vs. Industrial Comm., 211 Wis. 445, 448, 248 N. W. 443.

(b) That presumption could not possibly be considered as met or overcome by the evidence presented in the present case. Nor does the suggestion of suicide, as a mode of inferentially dating death as at the time of departure, take into account the fact that the policies, as pointed out in our statement of facts, contained provisions against recovery in the case of suicide, sane or insane, within one year from date of issue of the policies; and that two of the policies were issued within less than a year from the date of Westphal's flight. The suggestion of suicide rejects Westphal's own solemn declarations of a contrary purpose, and would be sheer conjecture.

(c) The disappearance cases relied on in petitioners' brief will be found, on examination, to be clearly distinguished on the facts from the instant case. For instance, the case of *Whiteley vs. Equitable Life Assur. Society*, 72 Wis. 170, 39 N. W. 369, much relied on in petitioners' brief and apparently in the dissenting opinion below, has general language quite appropriate to the facts of that case—which were: the wholly unexplained disappearance of a man while on a business trip, no cause, reason, or explanation whatever being shown by the evidence. On such facts, the case was comparable to the case of *Delaney vs. Metropolitan Life Insurance Co. (supra)* and similar cases in Wisconsin

and elsewhere. But such factual situations have no basis of comparison with the factual situation presented in the instant case, and language appropriate to such factual situation as existed in the *Whiteley* and the *Delaney* cases is wholly inappropriate if transposed and attempted to be applied to a factual situation such as the instant one. A perfectly clear line of demarcation classifies the Wisconsin disappearance cases and puts on one side the factual situations which involve the person who disappears without any explanation or showing of adequate reason or motive. In those cases, an inference of death at the time of disappearance is permissible; but when additional circumstances, such as those of the instant case, are added by undisputed evidence, showing a strong motive for disappearance, showing a confession of criminal activity, and showing an avowed declaration of purpose to abscond and conceal himself until able to make good his defalcations,—the additional undisputed evidence cannot be arbitrarily rejected, and upon settled principles the plaintiff has not carried the burden of proof and no jury issue is presented. Typical of the differing factual situations presented by other cases cited in the petitioners' brief is the case of *Griffin vs. Northwestern Mutual Life Ins. Co.* (Michigan), 229 N. W. 509, relied upon in petitioners' brief, is seen to be of no assistance when the facts are examined, for in that case the evidence indicated that the missing man had taken passage on a ship and embarked on a voyage and disappered during the voyage; a factual situation not possibly to be compared with the evidence in the present case.

Petitioners' brief takes as a confession of error, and constantly reiterates, the statement from the opinion below that, upon the evidence, two inferences are made. Obviously, petitioners' counsel does not understand the sense in which that statement applies to the evidence. It could as well have been said that as many inferences were made as

to time of death as there were days in the entire seven-year period. The turning point of the case is that an inference that he had died on any day in the second, or third, or fourth, or fifth year after his departure was more consistent on the undisputed facts than an inference that he died at or about the time of his departure; and, even if the inferences were merely of equal consistency, as is evident at the minimum, that, on the settled law, would not make a jury issue.

Conclusion.

To say that on the evidence in this case a jury may be permitted to find that Westphal died at the time of his flight is to say that in every instance of a criminal absconding and in every instance of one absconding who has a strong motive so to do from whatever circumstances, and who leaves written declarations of that purpose at the moment of his flight, if he leave relatives for whom he has affection, juries may find, on nothing more, death at the time of departure. This seems contrary to all reason and common sense, for the very circumstances of the flight imply attempted concealment for a considerable period of time. To say that death occurred at the time of flight, rather than seven months, or a year or two or four years thereafter, is the sheerest conjecture. And a great advantage would be conferred on the beneficiaries of such criminals and absconders as against the policyholders who have no occasion to abscond and to default on premiums.

It is respectfully submitted that the petition for writs of certiorari should be denied.

Respectfully submitted,

BERNARD V. BRADY,
Counsel for Respondent,
Kansas City Life Insurance Company.

229 E. Wisconsin Ave.,
Milwaukee, Wisconsin.